

MONTANA LEGISLATIVE HISTORY

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Chapter 499 19 91

Bill H 538 S _____ Original bill & history C

H. Committee on Business & Economic Development S. Committee on Business & Industry

Hearing Date(s) Feb 15 ☒ C

Feb 18 ☒ C

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Date Out Feb 18 ☒ C

Hearing Date(s) Mar 22 ☒ C

Mar 26 ☒ C

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Mar 26 ☒ C

Did this bill originate in an interim committee? ☐ Yes ☐ No

Committee _____

Report _____

HB 538 INTRODUCED BY BRADLEY, ET AL.

REGULATE PRICE OF RETAIL MOTOR FUEL
AT WHOLESALE AND RETAIL LEVELS

BY REQUEST OF MARKET MOTOR FUELS,
JOINT INTERIM SUBCOMMITTEE ON

2/01	INTRODUCED		
2/01	REFERRED TO BUSINESS & ECONOMIC DEVELOPMENT		
2/01	FIRST READING		
2/01	FISCAL NOTE REQUESTED		
2/07	FISCAL NOTE RECEIVED		
2/08	FISCAL NOTE PRINTED		
2/15	HEARING		
2/19	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/20	REVISED FISCAL NOTE REQUESTED		
2/23	2ND READING PASSED AS AMENDED	74	25
2/25	REVISED FISCAL NOTE PRINTED		
2/25	REVISED FISCAL NOTE RECEIVED		
2/26	3RD READING PASSED	67	31
	TRANSMITTED TO SENATE		
2/27	FIRST READING		
2/27	REFERRED TO BUSINESS & INDUSTRY		
3/22	HEARING		
3/27	MINORITY COMMITTEE REPORT ADOPTED—BILL		
	PASSED AS AMENDED	28	21
4/01	2ND READING CONCURRED	29	20
4/02	3RD READING FAILED	25	25
4/03	RECONSIDERED PREVIOUS ACTION	31	18
4/04	3RD READING CONCURRED	32	18
	RETURNED TO HOUSE WITH AMENDMENTS		
4/09	2ND READING AMENDMENTS CONCURRED	87	7
4/10	3RD READING AMENDMENTS CONCURRED	87	11
4/16	SIGNED BY SPEAKER		
4/16	SIGNED BY PRESIDENT		
4/16	TRANSMITTED TO GOVERNOR		
4/19	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 499		

EFFECTIVE DATE: 4/19/91

HB 539 INTRODUCED BY DAILY, ET AL.

GENERALLY REVISE STATE COMPREHENSIVE ENVIRONMENTAL
CLEANUP AND RESPONSIBILITY ACT

2/01	INTRODUCED		
2/01	REFERRED TO NATURAL RESOURCES		
2/01	FIRST READING		
2/13	HEARING		
2/21	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/23	2ND READING PASSED AS AMENDED	97	1
2/26	3RD READING PASSED	97	2
	TRANSMITTED TO SENATE		
2/27	FIRST READING		
2/27	REFERRED TO NATURAL RESOURCES		
3/11	HEARING		
3/27	COMMITTEE REPORT—BILL CONCURRED		
4/03	2ND READING CONCURRED	48	2
4/04	3RD READING CONCURRED	45	5
	RETURNED TO HOUSE		
4/11	SIGNED BY SPEAKER		
4/11	SIGNED BY PRESIDENT		
4/11	TRANSMITTED TO GOVERNOR		
4/16	RETURNED TO HOUSE WITH GOVERNOR'S AMENDMENTS		
4/19	2ND READING GOVERNOR'S AMENDMENTS		

Jerry T. Loendorf, Montana Consumer Finance Association, an association of consumer finance companies, said HB 725 will increase terms for loans from \$1,000 to \$2,500 by increasing repayment time from 37 months to 48 months. This is a practical matter. There are very few loans made in these amounts for a term of 48 months. This request is made because a few people would like to extend small loans for a longer term thereby reduce the monthly payment. You can't do that for a loan that small without a law because it increases the risk substantially. An example is an automobile loan for \$2,500, which is the only amount that can be codified although a loan can be as low as \$1,000. For something that doesn't have a very long life, 48 months is quite a long time. An aluminum boat could last another 10 or 20 years and would be eligible for an extended repayment time. This bill is one that is going to apply only in a few situations.

Opponents None

Questions from the Committee

REP. BENEDICT asked Mr. Loendorf if he is for or against the bill because he at first talked for the bill and then talked about the risk of extending loan time for something that did not have a very long life. Mr. Loendorf answered he is for the bill. The lending institution would have to make that judgment. No other lending institutions under this old law have any type of limitation like that. They take the risk. HB 725 forces them to do so.

Closing by Sponsor

REP. SPRING closed. He said this is an O.K. bill and recommended a Do Pass.

EXECUTIVE ACTION ON HB 725

Motion/Vote REP. PAVLOVICH moved HB 725 DO PASS. Motion carried unanimously.

HEARING ON HOUSE BILL 538

Presentation and Opening Statement by Sponsor

REP. DOROTHY BRADLEY, HD 79, Bozeman, sponsored HB 538 which is an act to regulate the price of retail motor fuel at wholesale and retail levels; provide for penalties and remedies for sales in violation of established prices; prohibit unfair practices in the sale of retail motor fuel; and provide an immediate effective date. She asked her constituents to teach her what predatory pricing problems there are in the state. At that time Montana did not have a definite case but there were a number of indicators to her that their suspicions were very possibly based on things that were going on. A 1985 study in the State of Washington found that predatory pricing was taking place. A whole array of proposals

came out of that study that were far more drastic and far more severe in their actions than a below-cost pricing measure. The Washington study resulted in legislation that was enacted there in 1986, and that law was the model for bills that were rejected by Montana's 1987 and 1989 legislators. There are other indicators as well, such as the fact that the wholesale price being paid by some of the independent dealers was actually higher than the retail price that was posted in some of the service stations just a little ways down the street. When you see something like that happening, there probably are some unfair practices being carried out. There is a lot of protection of these records. They are hard to get your hands on because of the trade rules. It doesn't take long to look at information like this to see that something is amiss.

There was also a period of time where the overall price on oil internationally was dropping and the consumer prices at the gas pumps were going up. This whole combination led us to look at an array of proposals that could be brought before the Legislature. One is known as divorcement which is fairly severe. In order to make sure there is no vertical integration taking place from the refinery to the distributor to the retail outlet, you simply separate the refining segment from the marketing segment of this industry. You can't have them be one and the same. They decided that probably was a too severe, or went a little further than they needed to go, so they looked at the alternative which was prohibiting the below-cost sales when that bill was introduced. If there were no predatory pricing taking place in the State, then this bill should not be a matter of concern to anybody. If there is predatory pricing taking place, then it behooves the State, the County Attorney, Department of Commerce, the Attorney General to do something about it.

This bill went through the House in 1989 with a fairly good vote, went to the Senate, side by side with a request from the State. The Senate took the route of acting on the cautious side, decided to leave the bill at the wayside and do a study in the interim which resulted in the report which resulted in the "Motor Fuel Pricing Problem". It starts out with language that there have been profound changes taking place in motor fuel marketing in the last two decades; that there is a mass exodus of independent dealers disappearing from local neighborhood stations. The result was the recommendation of two bills. One is HB 538 prohibiting below-cost sales.

The bottom of page 5, Section 4, says the wholesaler can't sell motor fuel to a retailer at less than the delivered cost plus the cost of doing business. Also a retailer can't sell motor fuels to a consumer at less than the delivered cost plus the cost of doing business. That is really the heart of the bill. The only complicated problem is figuring out what the cost of doing business is. In Montana this is a fairly routine kind of calculation. In many states there seems to be a fair amount of agreement by the public body and the Legislature, what a fair

cost of doing business is. Guaranteeing a big profit is not the intent. The intent is to stop the selling of product at below-cost. When it is subsidized, it comes up the pipe, and a smaller percentage of businesses cannot stand that kind of competition. They will continue to drop out of business. An uncontrollable monopoly then increases prices without competitive restraints. Say you start with a wholesaler; the distributor in Bozeman has to deliver at cost which includes loading up the truck at a rack with a posted rack price, delivering it to one of their outlets, say in Townsend, so they include the cost of that freight which is also easily calculable, (the common carrier freight rate is regulated by the Public Service Commission) plus taxes. That is the delivered cost, plus the cost of the labor, and plus the cost of doing business.

The definition lays out what the cost of doing business is. It is one percent for the wholesaler unless it is proved less. You always have that opportunity, but the estimate for a distributor is one percent including labor, rent, depreciation, and such aspects as are part of doing business. You simply say what they are limited to is an accountable low in the delivered cost plus one percent which is the cost of doing business. The same calculation is done for the retailer. They have to calculate their delivery cost plus their cost of doing business, which has been set at six percent. They can't go below that; however, they can go lower if they can prove themselves. For purposes of definition they start with six percent. Obviously it is higher than a distributor's cost. You have a building, overhead, more labor costs, rental costs, housing, more interest, more maintenance, credit card fees, etc.

The third thing this measure does is say a wholesaler cannot sell or transfer motor fuel to his own retail outlet at a lower cost than he sells to other retailers. There are exceptions to this rule shown on Page 7, Sections (6) and (7), current sale, sale of damaged product, liquidation, etc. that shouldn't have to come under this rule. Page 8 talks about penalties, remedies, the involvement.

They have waited two years for this bill, it had a very good chance of passage last session, there was a lot of support for it. There is a great deal of concern at the local level. It was decided not to act in haste, but to study it in a thoughtful way through an interim study, and are now armed with that study's recommendations. She hoped it would be given a Do Pass.

Proponents

SEN. ESTHER BENGSTON, SD 49, Shepherd, who was chairman of the Joint Interim Subcommittee on Motor Fuel Pricing, said REP. BRADLEY had explained the Interim Committee Study thoroughly. She is a supporter of HB 538. The Interim Subcommittee had to learn a new language. They studied many reports and felt they came up with a common sense approach. There were several bills on

divorcement, another bill on open supply, a dealers' bill of rights, and concluded this bill was the least that could be done for consumers. It is probably like closing the barn door after the horse has got out. It puts some teeth in the bill so if there is an aggrieved dealer, he can take it to court. Even though it is not perfect, it is impossible to respond to all the editorials and articles that came out about the oil industry being accused of profiteering and price gouging at the gas pump, it's a response of this Legislature that we at least recognized there are independent dealers out there who are having a tough time.

You will be doing the right thing by passing this bill. It is a common sense approach. She hoped the committee would bear in mind that it was not easy for the Interim Committee members to learn the language necessary. That Committee was not unanimous, there were two negative votes, so there is opposition. You will hear all kinds of it. The Interim Committee did recommend HB 538 and HB 261, which incorporates into Montana law the language of the federal Robinson-Patman Act, should pass.

Ronna Alexander, Director of the Montana Petroleum Marketers Association, the members of which are about 90 wholesalers and distributors of petroleum products. Along with their bulk operations a number of the marketers own their own retail locations. Some background information on the study itself. The study resulted when the great changes in the marketplace took place, and there was departure of a great many independent dealers in the retail marketplace. Retail service stations have disappeared in droves, and although there are several reasons for that, there was evidence that unfair and illegal price effects contributed to this. The committee started meeting in March and concluded in September. They did recommend these two pieces of legislation. HB 538 would not create a whole new law if adopted. She handed out a copy of 30-14-209. EXHIBIT 2. That is the Unfair Trade Practices law that prohibits selling product below cost in order to injure competition. It is lacking however and you will hear more about this from the Attorney General's office in that there is not an adequate definition there in relation to determining motor fuel costs. HB 538 will provide that definition, and hopefully provide a vehicle of proof for determining what the cost is. There are 23 states that have general fair trade laws on their books, 11 states have addressed motor fuels specifically in trying to ensure a level, equitable playing field. The laws they reviewed have some general things that apply to this case. They prohibited predatory pricing. They do recognize the need to meet price reductions. They allow retailers below pricing by a competitor in the same market, and they also recognize the difference in cost attributable to legitimate economic factors.

She handed out EXHIBIT 3, an article from the Salt Lake Tribune. Several years ago Utah enacted similar legislation and is now testing it. The Attorney General there has taken a strong stand to achieve what he feels is conserving competition. It is

happening all over. Some states currently also have legislation of this type pending. The reason is that this is a universal problem. The big question is, is motor fuel being sold below cost? One of the things the Interim Committee was charged with was to conduct a study to look at pricing around the state using the formula to see if this was actually occurring. On April 24 a statewide phone survey was taken which compiled the lowest street price in 92 cities for regular, unleaded and diesel fuel. She handed out graphs showing the results of that study EXHIBITS 3A. The first set of graphs showed the cities represented individually by the margin by cents per gallon, and then the average. The other set of graphs showed the margin by cents per gallon and then the numbers of cities that followed those respective margins. If you look closely at them, you will see that there actually were two markets selling in the minus area. Also you will see the average market of the majority of the cities was 8 to 9 cents. The Committee also was asked to inquire from the motor fuels retailers what the breakeven requirements were for their respective businesses. There were four categories, truck stops, convenience stores, full service stations, stations that were retailers. The last page EXHIBIT 3B shows the Motor Fuels Dealers' break-even margin requirements varied from 8 cents to 17 cents for a full service station to just break even. She felt the Committee did a good job in looking at this issue. It is a complicated industry. This is a consumer bill, and the answer has to be that if this practice is allowed to continue, there will be less competition in Montana.

Mark Racicot, Attorney General, said they have been involved with these bills. They have some concern with the enforcement mechanism. They have more experience than anyone else in dealing with this particular topic. There is a serious, very deep seated feeling. On the one hand when you read the word antitrust, there are those in open commerce who tend to exaggerate on these; on the other hand, in talking about ignoring it, there are those who believe that passing this will create certain panaceas for civil actions that will allow very, very serious problems to be addressed. He provided information to the Committee and offered some advice because there are a number of different avenues of approach being undertaken here. In reference to what is occurring in the Senate, and what is occurring in the House, we have SB 190 talking about dealing with antitrust from the perspective of a number of different interests, and also HB 717 creating an antitrust unit in the Department of Justice. We have been acting in concert with those who have requested our assistance. Those developments are not within the confines of the Department of Justice. HB 538 and HB 261 will be heard this morning. There are certain funding mechanisms and people provided for in HB 261 which may be subject to some amendment to remove them because the fiscal note is so high they are worried about deleting the provisions of that bill. HB 538 has the Department of Commerce and the County Attorney involved in handling mechanisms there. There is no private remedy in HB 538. There are private remedies in SB 190, so as a consequence it may take some time to work out

some sort of cohesive strategies to address this particular problem. This kind of investigation is extraordinarily difficult.

HB 538 specifies the event. In essence, it prohibits the wholesalers from selling motor fuel to a retail motor fuel outlet at less than the delivered cost of the motor fuel plus the cost of doing business if the effect is to injure or destroy competition or substantially lessen competition. It further prohibits a retailer from selling motor fuel at less than the delivered cost of the motor fuel plus the cost of doing business if the effect is to injure or destroy competition or substantially lessen competition. This terminology is defined in the bill in a much better fashion.

He was not aware that the Attorney General or the Department of Justice would be involved in some fashion with the amendments to important portions of HB 538. The County Attorney and DOJ should not be involved. He didn't mean it to be a negative observation. That is something that could reasonably be considered when provisions coming before this committee are presented. The language is extremely amorphous and establishes an extraordinarily high burden of proof necessary to establish a legal action. It also takes an incredible amount of investigative time. These are very, very labor intensive investigations. During the last year attempts to look at some practices discrimination suits were made. They looked over the course of a year at a number of different activities occurring in the State of Montana. Quite frankly, they did not have a lot of resources to dedicate to that investigation. Over the course of a year they realized that an event that occurred on one day in one year decrees a lot of time to try to find. It is necessary to start securing company records and pricing information as well as cost of transportation and every other cost of doing business, analyze all of those documents and make a determination as to whether or not they were prohibited by the statute. Those things take a great deal of time and expense. On the one hand those who panic about the discussion of antitrust enforcement are in some ways overly concerned about the opportunities to create some mischief with this type of provisions, whether they are in SB 190 or HB 538 or HB 261, because very, very high standards of proof have to be established that require a very, very large amount of investigation and time. Secondly, as seen from that same process, it will not provide a panacea for those who are concerned about these kinds of things. It is very, very complex. Any antitrust enforcement is extraordinarily complex.

He suggested sitting down with SB 190, HB 717, HB 538, HB 261, to try to take all those various pieces of legislation that are involving themselves in some form of antitrust investigation or enforcement concerning essentially two things, whether or not this Legislature wants to provide government to aid in private remedies to address antitrust; and which agencies are going to be involved in enforcement. It is probably not in their best interests to have the DOC, DOJ, and County Attorneys all involved

at the same time. The County Attorney's offices are literally, totally and completely unprepared to take on any kind of antitrust enforcement. The AG's office is unprepared at this time to take on meaningful antitrust enforcement for consumer protection. On dealing with the DOC a number of times, they likewise are just simply not in a posture to do this, so some very monumental choices need to be made whether or not to apply governmental remedies as well as private remedies, and who is going to be responsible for those duties. They are expensive, they are necessary in many instances. They do have the opportunity to run into these problems on a continual basis. Their office gets called on every single day with some complaint about petroleum products, or an antitrust question. There is a lot of concern about this particularly in the spring and again in the fall when people are stocking up on winter fuels, and in the summertime there is involvement in recreation. It covers a wide spectrum from meat packing to petroleum products to other kinds of concerns in the State of Montana that deserve some antitrust examination. However, they have not been involved in antitrust legislation since 1981 at the state level. We have not been effecting an advantage because often service has applied to the citizens who are screaming or yelling about some sort of unjustified intrusion into legitimate business affairs of the people of Montana. At the same time if we don't exercise self-vigilance of these kinds of practices, we end up placing consumers and the people of Montana at a substantial disadvantage. He strongly recommends the Committee consider and they would be more than happy to be available at every opportunity to sit down with representatives from Commerce, this Committee, and the industries that are affected, to arrive at some systematic approach to apply these kinds of services without going overboard.

Stephen D. Visocan, Past President of the Western Petroleum Marketers Association, is a jobber which is the term used for wholesaler. He operates in Helena, Great Falls, and Dillon. He is talking about the specific language in the bill because he participated in the Interim Study. A lot of that has been covered by REP. BRADLEY. Currently there is a consumer protection law on the books, and it says that you can't sell product below cost. HB 538 better defines what cost is for the petroleum industry. As indicated by the Attorney General, it is very difficult with the existing law to determine what it costs to buy petroleum. If you look at refiners you have to look at how much it costs for crude oil, how much it costs refine it, what the value of the asphalt that comes out is, what the value of the heating oil is, all those things are components in determining what the cost of the product is. HB 538 says first of all there is a base cost to start with -- the cost of the raw material at the rack which is the location where it is picked up, the terminal of the refinery. Everybody has a rack price. There are different rack prices, so in order to assist in the enforcement of this situation, rack prices are the cost of the raw material.

Second is the freight cost. Common carrier freight charges are determined by the Public Service Commission (PSC) and are readily available. Then you know what the cost of the freight is. The cost of doing business gets difficult. That is where it really gets difficult for an attorney or Attorney General or anyone else to say what it costs to operate a Super America station, or what it costs to operate a Pop Shoppe; the cost to operate other stations or stores. The costs include interest, personnel, utilities, a variety of things, before that person could even begin to make a profit. In order to simplify, this bill has some standards that can be applied. For a wholesaler in the absence of proven costs, a 1% markup over the delivered costs can be used as a basis for determining what the cost of doing business is. For a retailer it is 6%. In Montana many jobbers use the rate of 1% and very similar when they sell to large transport owners. There isn't much fuel traded any less than that. That is a good basis. Other states that have similar laws use a higher number. As originally written, the bill showed 3%. It was based on Wisconsin's margin which was 3 and 6%. In Montana a jobber doesn't make 3%. It is closer to 1% to which this bill is lowered. That is representative of their cost. Idaho uses 2%, Rhode Island uses 2%, Utah doesn't have any combined wholesaler cost, Wisconsin uses 3%. In the absence of proof of a lesser cost, a retailer can use 6% which is also used by Idaho, Rhode Island, Utah and Wisconsin. Another state is currently considering the same basic legislation and it has just passed committee. The vote was very much in favor of the legislation, and they are using a 9% combined margin for wholesale and retail. The numbers of 6 and 1 are representative of Montana's costs, but are low compared to other states. It should be representative of cost. This bill is to stop people from selling below cost.

Mr. Visocan passed out amendments. EXHIBIT 1 Some of these are housekeeping type amendments. The second amendment recommends cost of doing business as defined for a wholesaler be changed from 3% to 1% which is representative of costs in Montana. Page 7 paragraph (6), this particular line is meant as a means of meeting competition. If someone else can operate cheaper, that clause is necessary when selling in the absence of proof of a lower cost. If you can operate cheaper, then you can sell your product. We are not trying to guarantee profits for anybody. If the other guy can operate cheaper, and he is selling below your cost, you can meet his price if you choose. Which is an important thing.

The other change proposed in these amendments is the change in the enforcement of the provisions in this bill. As the Attorney General indicated, having two different departments and the County Attorney involved in enforcement may be more costly. This provision eliminates the involvement of the DOC and it also simplifies the verbiage. Basically Section 7 has been eliminated from the bill. The enforcement provision, amendment 6 changes Section 6 to read: (2) "Upon presentation by an offended party of evidence of a violation of section 4, the department of justice

or a county attorney shall issue to the suspected retailer or wholesaler a demand by certified mail to cease the violation. If the violation is not corrected within 24 hours after the suspected retailer or wholesaler receives the notification, the department or the county attorney may bring an action to enjoin the violation. Upon conviction, a retailer or wholesaler is subject to a civil penalty of not more than \$1,000 a day for each day that the violation occurs." Then it goes on to say "An action under this section must be commenced in the county where the motor fuel is sold." If the action is brought by the department of justice, one-half of the amount of the penalty must be deposited in the general fund in the county where the action is brought, and the remainder in the state general fund; or if the action is brought by a county attorney, the entire amount of recovery must be deposited in the general fund of the county where the action is brought. To simplify enforcement an offended party doesn't have to go to court to begin some action. The county attorney needs to write a letter to the offending party for the first violation in order to get the offender to reduce his out-of-line price. If that is done, then things will be taken care of and the person would no longer be selling below cost. If not, then it would be necessary to take additional legal action. Below-cost selling does go on in Montana. He hopes the committee will vote for this bill.

Ron Leland, Independent Sinclair Dealer and also a member of Automotive Trades of Montana, an association for the service stations, said one question has not really been brought out. Has below-cost selling really happened in the State? An Interim Committee survey taken showed at that time it was happening right here in Helena. In Helena when he bought a gallon of gasoline to resell, he paid \$1 for it. The street price was 98.5 cents. It does happen. If this happens for one or two days, he could live with that. But in the gas industry, once the price is down, it may take a long time for that market to recover, so for weeks or months the profit margin will be very slim for independent dealers. The greatest amount of money he ever lost on selling gasoline was a nickel a gallon. If he bought it for \$1, the street price was selling for 95 cents. It is impossible to stay in business doing that. How can multi-stations companies stay in business doing that? They can't. They are subsidized from other areas or other states. He cannot do that. This bill intends to make a level playing field for everybody concerned. He is not looking for a guaranteed profit or a large markup. Remember the percentage that has been brought out here is one and six. That is to keep anyone from selling below cost. He urged support for HB 538.

Neva Hassanein, Northern Plains Resource Council staff, said they don't have a specific injury from this bill. They have been working on this kind of legislation because of their concern about the growing monopoly in the beef and lamb packing industries. They support efforts by citizens and by the State to create fair and free competition in the marketplace whatever that

marketplace may be. They support this bill.

John Taggart, President of Automotive Trades of Montana, said this bill was supported by them two years ago. He pointed out that below cost sales are made over 90% of the time. That infers the refineries are selling below their cost. The gasoline is being sold below the wholesaler cost at retail or is being sold below the dealer's cost. They did not mean to infer that the refiners ever sold gasoline below their cost. This bill was recommended by the Interim Subcommittee, they did review these facts all summer long. He thanked REP. BRADLEY for her stamina, and asked the committee to vote Yes for this bill.

Opponents

SEN. JERRY NOBLE, SD 21, Great Falls, said the vote on the Interim Subcommittee was 6-2. He pointed out it has been said it is a consumer bill. If there was an anti-consumer bill, this is it. If we are going to put a bottom price on motor fuel, then there should be a top price on it, too. He would like to fill his trucks up at a below-cost station if there is one. Everybody has different costs of doing business. Pepsi-Cola is sold for various prices. Should Pepsi-Cola be on here? This is a very complex problem. Maybe this exists in all types of businesses. There already is a statute in the codes since 1933. The Supreme Court threw it out. The Legislature changed some wording in 1935, and it was adopted, but nobody has ever been prosecuted under it. The attorney general testified that it is very, very difficult and time consuming to try to enforce this type of legislation. Costs of doing business - let's say on a given 2 or 3 days the operator of a service station decides to get into the marketplace and sell some fuel to create some traffic, so he lets all his employees go, turns out his lights, turns down the power to save money, and does everything he can do for two or three days to forego expenses. He sells the fuel for whatever he wants to sell it for - which is his given right - that is called free enterprise. Somebody turned in a complaint that he is selling fuel below cost. Several weeks later somebody, an attorney from the Justice Department, started checking records. How would they ever figure out what happened? So the cost of doing business is different every place we go. Some service stations sell milk and bread, some sell beer and wine, some sell cigarettes, some fix tires, some do big mechanic jobs. They can price their fuel so that they hopefully won't lose money. Some sell auto fuel, farm fuel, some don't sell so much. It is impossible to legislate anything that is going to correct this situation. There is a study of the prices that are charged all over in the Study Committee book. Some people made 18% profit, some made 3%, just all over the ballpark. It's the cost of doing business.

Free competition is when we are able to do what we want in the marketplace and not be restricted by government. If we are going to put a bottom price on this fuel, we are certainly not contributing to free enterprise, free competition, or are for the

consumer. It is a very, very complex problem and there is a very short time to study this. Call your fuel distributors and service stations and ask them how they feel. Two last points - these two gentlemen represent ATOM which is an association with around 30-35 members. There are some 1300 service stations in Montana.

On Page 3, line 6 of the bill, it says "all taxes", does this include the state and federal gasoline taxes which are 34.1 cents per gallon. The dealer doesn't pay this tax. The tax is paid by the consumer. Why is this included in the cost? The committee should give this a very good study and do what they think is best.

REP. JOHN PHILLIPS, Great Falls, said he served on the Interim Subcommittee. This proposal is self-serving for a few people. He reiterated there are some 1300 service stations. If this were a big problem there would be many more people in attendance at this hearing. All of us are involved in fuel prices. In Great Falls fuel prices went up a dime before the troops got to the Palace. The rack prices didn't change a dime. The gas in the tanks hadn't changed a dime, but the price jumped up, and it kept going up. A friend told him to fill his tank before 4 o'clock one day because it was going up 6 cents, and it did. There is no collusion here? But everybody went up at once. Except for one station. He pulled in, filled up his tank and asked why his price wasn't up to what the others were. He was not a part of the collusion, but he checked the others, and soon caught up. This is how these people play games. A friend returned from Los Angeles and asked why gas in Southern California was \$.99 and \$1.01, and it is \$1.29 up here. Is there that much difference in transportation costs? You all know that Montana gas prices are the highest throughout this so-called oil shortage although there never has been a shortage. We are running well above the rest of the nation. The point is people can set the price for whatever they want. He proposed an amendment for the committee to adopt, that if there is to be control of the bottom price, there has to be control of the top end also. Paul Verdon has that amendment. It would help keep prices down instead of letting everybody set them arbitrarily. It's no problem on record keeping, since a record has to be kept anyway, to keep someone from selling below cost.

Janelle Fallan, Executive Director of the Montana Petroleum Association, submitted written testimony, EXHIBIT 4. They do not support predatory pricing, nor price gouging. They do support a free, open, fair competitive market, believing that is the best way to deliver product to the consumer at the best price. There has to be protection of small businesses. HB 538 says to Montanans that we are going to establish a floor on the price of motor fuel and thus guarantee a profit for a small group of people at the expense of Montana consumers who depend on motor fuel for their livelihood. Out of the 1300 service stations, about 50 of them are owned by companies that also own refineries. Other than that it is the independent wholesalers and retailers who would be guaranteed a profit margin. It protects them from

their own competition. She had not seen the amendments, so her testimony referred to the 3% and 6% margins. She commented on the fiscal note. If a floor is to be set on prices, adding three FTEs to the DOC is an understatement. If you are going to place government in an arena that has previously been controlled by protective forces in the marketplace, more than three people would be needed. Also consider the effect of this bill on local governments. The fiscal note doesn't say anything about this. Passage of this bill will lead to higher motor fuel prices for consumers. She handed out 'Gasoline Marketing in the 1980s: Structure, Practices, and Public Policy' and 'Empirical Examination of Allegations of "Below-Cost" Retail Selling of Gasoline by Refiners'.

Charles Brooks, Executive Vice President of the Montana Tire Dealers Association, opposes HB 538. He talked about some principles involved, and experiences as a retailer of general merchandise and of gasoline operating under a price control structure. EXHIBIT 4A. Anyone involved in the selling of merchandise should have the freedom to compete and price his merchandise as he chooses. He urged HB 538 be given a do not pass recommendation.

Jan Cool, Public Affairs representative for Exxon Company, U.S.A., submitted testimony EXHIBIT 5. Exxon is opposed to this bill because it attempts to guarantee profits for a small group of marketers at the expense of higher motor fuel prices in Montana. Right now the marketers can keep the traffic flow below cost. This bill penalizes that efficient marketer because if there is a floor under the prices that retailers, wholesalers and integrated refiners must charge their customers, retailers must mark up retail fuel they sell by 6%, and wholesalers by at least 1%. The money to pay for these increased margins is not going to come from the industry, it will be paid by Montana consumers. This legislation will not provide any additional long term benefits to those who support it. The committee was urged to reject HB 538.

Dan White, on behalf of Ward Shanahan who represents Chevron Corporation, presented a written statement from Mr. Shanahan. EXHIBIT 6. He read the statement in opposition to HB 538. This kind of legislation is anti-consumer and anti-competitive. They suggested some proposed amendments and would be available to work with the sponsor or the Committee to make the appropriate changes.

James Tutwiler, Montana Chamber of Commerce, said he did not think this was a role for the Montana Chamber of Commerce because of the problems of enforcement, the inadequacy of anti-trust legislation. Technical aspects are the best way to compute price of fuel. He spoke from the standpoint of the Montana Chamber which represents over 1,000 businesses throughout Montana and a wide variety of businesses, and probably businesses that either oppose or support this legislation. Their concern with this kind

of legislation is that as they read the bill and listened to the testimony this morning, it is clear that it is a cost-fixing price setting for a floor setting type of legislation. They don't believe that trying to regulate or mandate or legislate prices in the free marketplace is an approach that in the long run will benefit Montana businesses and Montana consumers. They are concerned because they feel that there is a constant effort, a constant ongoing stream of ideas of legislation and rules to do this sort of thing, and if you pass over the very significant landmark legislation and direction, you are really communicating to Montanans and to businesses outside of Montana that within the State we are willing to let forces other than the marketplace itself intervene in how consumers are served. This is a very complex subject. He is impressed by reasons explained in the Interim Subcommittee report. There has been a lot of hard work put into this subject. There has been some diversion among the people who worked on that Committee. REP. BRADLEY has worked hard to make this bill a good bill and she has been a champion of economic development for the State. He doesn't think with all due respect that this particular bill gets the job done for making business better for Montana, or business better for consumers. He urged the committee to not support HB 538.

Annie Bartos, Chief Legal Counsel for the Department of Commerce, said the Department was present to provide information to the Committee. They are neither a proponent nor opponent of HB 538. The Attorney General's concerns are somewhat the same concerns of the Department. There are a number of bills that were mentioned that pertain to the Unfair Trade Practices Law.

Questions from the Committee

REP. PAVLOVICH asked to speak to Jan Cool. He explained he was here two years ago when this bill came up. Every Monday morning when he came over from Butte a service station was charging \$.98. On Saturday it would be down to \$.88. This happened every week. What is the rationale for that? Ms. Cool answered the organization she works for maintains no control over those prices. The price charged is the decision of whoever owns that station. The consumer can make the decision to buy his gas on Friday. She did not know who owned the gas station in question nor which brand of gas was sold. There are several wholesalers who sell Exxon to the State of Montana. The biggest distributor is Exxon Company. REP. PAVLOVICH wanted to know why Exxon gas is \$.10 higher in Butte than it is in Helena, Missoula, Bozeman, or Anaconda. Ms. Cool said prices are set in the market by individual marketers. It is extremely difficult for her to comment on why prices are higher. Prices are determined by many different factors, transportation costs, costs at the rack.

REP. KILPATRICK asked John Taggart since he has been accused of being a self-serving non-consumer because you put a minimum on it, and they say there is no example of predatory pricing, if he would like to answer to some of those charges. Mr. Taggart said

one thing regarding pricing that has been glossed over is the fact that when you think of the distribution system of motor fuels, it is a chain of command, and Mr. Visocan used the term 'rack price' which is a term that we all use at the point at which the gasoline changes ownership from the refiners to the wholesalers, who in turn sell it to the dealers. Therefore, you have to realize the refiners are the ones who set the base price of the motor fuel. There is a problem in Montana for our gasoline is \$.20 a gallon higher than Idaho, Washington, or wherever. There is an absence of pursuit of refiners in Montana. There is no consumer organization in Montana that addresses the refiners in essence asking them to justify why their prices are so much higher. This was heard in some hearings. The Super America representative had written a letter to REP. BRADLEY explaining to her that they buy gas from the rack just like he does. When the dealers asked Super America to justify the fact that the wholesalers and the dealers got a \$.07 a gallon increase the next morning from the Exxon refinery, why didn't the Super America stations have an increase. We accused them of having a baloney increase making the wholesalers and the dealers subsidize their stations. That is kind of where we are at. The Super America representative said they were able to buy futures on gasoline. This is the kind of testimony for the next bill. The difference that was brought before the committee during the summer was that they say one thing and do another. Conoco and Exxon had already stated in the summer hearings that they arbitrarily without justification raised the price of gasoline in the spring \$.10 a gallon, and that the other refiners can jump in and buy the whole summer's supply at that point and the wholesalers and dealers are left at \$.10 higher all summer long. This is what they are addressing. The dealers don't do the predatory pricing. The dealers don't set the price. The 50 stations that the American Petroleum Institute representative alluded to that were refinery operated stations, are price setters in the marketplace. The wholesalers and the dealers have to follow those prices because we're talking bare bones.

REP. KILPATRICK further asked for an example of predatory pricing in Montana. Have you ever been acquainted with one? Mr. Taggart answered yes. ARCO is probably one of the greatest examples. The chain marketers and refinery co-ops have sold in Helena below dealer costs innumerable times. Ron Leland could help with this. The point is that if the refiners are able to sell to the public at a price below the wholesalers' or dealers' cost, certainly they can sell it to the dealers for that price, which they are not doing. Somebody needs to take them to task and ask them why they do that. There is a principle in American law that says if you are doing business with somebody, they do not take aggressive action to put you out of business. If you are an Exxon branded dealer, for example, you would normally think in American law that your franchisor would not take aggressive action to put you out of business. He submits this is not true in this situation.

REP. BACHINI said to REP. BRADLEY, we heard during testimony from

the opponents that during the Interim Study Committee there was no evidence found in this price fixing. What is your comment and do you agree with the wholesalers as far as that comment? REP. BRADLEY said she wasn't on that Committee. She has read the report and the information, and when Ms. Fallan said there was no evidence of predatory pricing, her response is that it is her understanding it is a matter of terminology because there was evidence of retail outlets selling at less than the rack prices. It just depends on what you want to call it, but it is her impression that came right out of that Study, and there is evidence exactly of that. In defense of the Study she said this was a last minute study that was added onto the list. Only three studies were funded and this was number three in priority, so not much money was put into it. It is not like the incredibly extensive study that came out of the State of Washington where documents were subpoenaed and examined. This was a matter of public testimony. We can't expect as much detail to have come out of it when we didn't put as much money into it to seek out that information. Yes, I call that predatory pricing.

REP. BACHINI asked REP. BRADLEY if this would prohibit what we know as gas wars within the State of Montana? One station will drop his price two or three cents, will that prohibit this from going on in the State anywhere. She replied she didn't think it would stop that. There is language in the bill that is printed out in good faith to try to meet competitors when they drop their price. There also are all kinds of exclusions that allow you to do business.

REP. BACHINI asked about the language on Page 6, line 21, that says 'if motor fuel is advertised, offered for sale, or sold as imperfect or damaged' - how can you determine imperfect or damaged fuel? Mr. Visocan said that is a very unusual situation, but occasionally fuel will be accidentally blended. Someone may drop diesel into a gasoline tank, or gasoline into a diesel tank. Then you have an imperfect fuel. REP. BACHINI asked how that can be sold as a gasoline? Mr. Visocan explained that gasoline is sold back to the refinery where it is reprocessed in order to return it to regular gasoline or diesel fuel. The sale of imperfect fuel is not made to the consumer, but the sale still has to take place so it is sold back to the refinery. If you look at the graphs that Ronna Alexander passed out, they show what the price is in 92 cities. Those are the actual survey numbers. If you look at the gasoline chart, in some cities gas was actually sold at less than the rack price. It was sold at less than the cost of the raw material. That did not include cost for any overhead or anything else. At the time the study was taken, gas was being sold in Montana for less than the raw material cost.

REP. BACHINI asked Ms. Fallan if she was the person who testified that there was no evidence found? Ms. Fallan said she did make that comment. One thing that is very important in gasoline pricing, and she urged the Committee to consider this in all issues and in response to REP. PAVLOVICH'S question, too, if you

want to know what is going on, you need to look at averages over time. A one day snapshot can give you a very inaccurate picture. You may find a situation on one day that could raise some questions. Probably need to know up front of the grievance the reasons behind that, so we have some real concerns about what kind of evidence you have. The Committee was pretty hamstrung by the amount of funding. Mr. Verdon tried to do the very best he could with the resources available. We just don't believe the necessary evidence is there.

REP. HANSON asked Mr. Visocan if a retailer had some surplus of super premium in a tank in which gasoline has been stored for quite awhile, it hasn't been moving, and they want to get it moving, so they drop the cost below rack cost because they want to get it out of their tank. How does this bill cover that situation? Mr. Visocan answered he is not honestly aware of that happening. This bill has nothing in it to cover that. It would be difficult to prove what position they were in. They don't want to get into the position of having to say they have an excess of gasoline, so am I allowed to drop my price. You don't want to get to where you have to prove what you have in order to effect the price that you are able to sell it for. If a person is going out of business or has an improper product, this says they can lower the price, but not because they have an excess of product. REP. HANSON asked if you are telling him that if I have a 5,000 gallon tank buried under there, and I have it full of super premium, and it has been there for four weeks, and trade in that area has suddenly stopped, there is no real problem and you don't want to unload it and clean it out and then replace it, that those circumstances would not count? Mr. Visocan said you can sell that at cost. You can't sell it below cost. That would be at the current replacement cost, so if the value of the product has decreased, you can take the price down to that, but it doesn't say that you can sell the product for less than cost, or less than current replacement cost. He pointed out that in today's market, people don't sit there with 5,000 gallons of fuel. People estimate how much fuel they are going to sell in a reasonable period of time. Volumes don't fluctuate that much.

REP. STELLA JEAN HANSEN asked REP. BRADLEY about Ms. Fallan's statement there is no definition of independent and small dealers. Is that defined in the bill? Wholesalers and retailers definitions don't take care of that. How would you define independent and small dealers? REP. BRADLEY felt the definitions which have been worked over for three years and are now in the bill do the trick. There is no question the definitions in the bill are alright. REP. HANSEN asked if she thought the cost of doing business figures in the bill is improper? REP. BRADLEY answered she did not think so. They have surveyed the prices that other states have come up with for estimated costs of doing business. It is her feeling it is very much on the low side compared to what other states are actually using. REP. HANSEN said she was assuming from the testimony given that the one or three percent arrived at would be only the cost of doing

business. REP. BRADLEY said that is correct. For a wholesaler that is now one and for a retailer it is six cents, which is a total of seven.

REP. ELLIS asked the Chevron representative, Ward Shanahan, if Chevron is a refinery. It is not. All their stations are handled through jobbers. They generally oppose price fixing legislation. REP. ELLIS explained this legislation is a means to get at refiners in this State who are providing unfair competition to other outlets. Mr. Shanahan explained they have a number of stations that are licensed through jobbers.

REP. CROMLEY asked if there are stations today who are selling below cost in Montana. Ms. Cool could not answer whether that is happening today, but it has occurred in the past. REP. CROMLEY asked if those selling below cost are selling other products or service. Mr. Visocan answered they are not talking about people who sell other products as a means of offsetting their losses from gasoline. We are talking about predatory pricing where someone intends to sell gasoline at a low price in order to drive somebody else out of business. There isn't enough profit in today's market to set up a convenience store or a full service gas station where you are selling gas. You have to make some money on the gas in order to stay in business. This bill says that you can sell gas at your cost and break even on it. It is not addressing the fact that some stations sell a different line of products and therefore make different amounts. The bill specifically says if you can do business cheaper because you operate a car wash or you sell bread, or you sell liquor, that you can consider that, and that's part of your way of lowering your cost of doing business, and therefore you can sell right down to whatever your cost is. REP. CROMLEY asked if the cost of groceries would be included in the cost of doing business. They would be Mr. Visocan answered.

REP. BACHINI asked if you are a station or convenience store operator selling gas. Mr. Visocan said he is involved in several phases of the operation. He is a wholesaler first of all, so he buys product directly from the refiners of Exxon and Conoco. He also operates convenience stores and gas stations. He has three full service gas stations and four convenience stores, so he is involved in all phases.

REP. BENEDICT asked if a convenience store had enough profit in that particular segment of their business to offset what they lose in their gas business, they can sell gas for whatever they want or is there a low below which they cannot go? Mr. Visocan answered they can allocate cost to the other functions of their business, but they still would have to allocate costs to their gas function in order to define that as a cost of doing business. An out-of-state example: Wal-Mart in Texas which has huge 'micro squirts' with gas pumps down on the corners of their places, and sold gas significantly below what jobber prices were at that time and obviously the Wal-Mart store was profitable. They don't show

profits but Mr. Wal-Mart appears very profitable. They were selling gas significantly below cost. It says you would have to include cost of operating the gasoline facility in your determination of costs. That does mean there is a floor under which they can't sell based on what they pay for their gas.

REP. CROMLEY said you have the convenience stores selling gas and groceries. It has been his experience that gas at stores selling other products is a little cheaper. He did not see the problem. Why couldn't they sell gas really cheap? Mr. Visocan said some of the things talked about here have indicated there isn't a lot of profit in gas. The margins are very, very small. Gas is more competitive than some people think. Some people have told him they just stop at the same gas station everyday and they don't even look at the price. Volumes are significantly impacted by the price that is charged. This industry is known for putting the price right out on the street so you know what you are going to pay for gasoline. Montgomery Ward is allowed to sell gasoline for half of what someone else who is relying on gasoline to make a living sells it for; then in a very short period of time they have all of the volume. After a short period of time the others would be out of business. Once they have all the volume, there would no longer be an incentive for them to keep the price of gasoline down since it now becomes a profit making business for them. At that point in time the price of gasoline would rise. That same example has gone on in other states, and is going on in Montana. You see people who have gone out of business because large marketers of petroleum products, be they refiners, multiple service stations, have chosen to take one particular area of the state, take the price way down, keep it down for a long period of time. Several dealers and/or jobbers in those towns then go out of business, making for several less competitors and then the price of gas went up.

REP. BACHINI commented that Mr. Visocan has the best of two worlds with this bill. You are wholesaler, retailer, convenience store operator. It seems that you could price fix as wholesaler, you have a retail outlet. Mr. Visocan said the bill is written to eliminate that capability. Mr. Taggart supports this bill and is very much interested in that. The bill says that I as a wholesaler have to charge the same price to my outlets as I charge to other people. I have to increase the price that I sell to my own outlets to include my cost of doing business as a wholesaler; and then as a retailer, I have to base the selling price on my cost of doing business as the retailer, so I have the same cost.

REP. BACHINI asked if he is a primary service station dealer or operator, or are you a convenience food operator with gas pumps down front? Mr. Taggart categorizes himself as being a service station operator, but is in fact a convenience store owner. He does not service cars or change oil. REP. BACHINI asked about the rest of the people who belong to the ATOM group. Are they operating the same way? Mr. Taggart said their vice-president in

Billings, for example, is a fast food operator and operates a conventional service station that repairs vehicles.

REP. BRADLEY told the committee when she was here two years ago, it wasn't for ATOM, for the independent dealers, or for the distributors, it was for the consumers because if we actually don't do anything, she fears the number of independents that have been forced out of work will be increased. The mass exodus as the study described it will ultimately be a very bad situation for Montana consumers. This is a complicated matter, but already Montana rule of law is there shall be no predatory or below-cost pricing if it is designed to ruin your competition. That was stated to you, and 30-14-209 says that. This is common law in every single state that says it is unlawful to sell at less than cost if it is for the purpose of injuring or destroying competition. That is what this country runs on. The problem we had utilizing that provision that is on the books was because people would say 'what is the cost?' So how do we know that it is less than the cost? All we are trying to do is put some teeth in this. It is pretty much in agreement in the country right now how cost is figured. You can go up and down above it, you can have all kinds of competition in there, but you can't subsidize this to kill your competition.

It was stated by some of the opposition this would be costly to enforce. If we have a stronger set of tools, we won't have to worry about enforcing it. Maybe just the availability of enforcement will be sufficient. Experience elsewhere in other states showed that is not the case. It is a serious problem and those tools are needed. We are not talking about Coca-Cola; we're talking about gasoline which is a basic necessity for every individual, every family, every business. That is why maintaining competition is so crucial. Again, as soon as they provided the tools in Arizona, the attorney general in that state says this is the first in a series of cases where we are going to show there is a move afoot by certain retailers to really eliminate competition. It is a three-pronged investigation in that allegations about below-cost selling, price gouging and price fixing will be looked into. They have stated that they are using the six percent markup for retailers exactly as we are.

Nevada was considering far more drastic legislation than this milder approach. That was the divorcement approach. Michael Calahan stated we believe that after reviewing the facts any reasonable lawmaker would reach the conclusion that we have. Franchise gas dealers of Nevada need protection, and they need it now. If further proof is needed to support the legislation, the retailers claim that ARCO and other refiners will skyrocket gas prices and petroleum products when not controlled. When we examined the strategic coal plan, and reviewed ARCO franchised dealers, they show federal documents that there was a very calculated move by ARCO to simply regroup in order to squeeze out their own retailers so they could get control, make this a monopoly and have price control.

Colorado has studied this matter. They are taking action on it at this time. They considered introducing legislation taking the two approaches which we also considered, one being divorcement, the more radical approach, and the other the more compromising approach which is the below-cost approach. Divorcement was never produced because it was kind of a tradeoff, and so the below-cost bill which incidentally started out at 10% instead of our 7%, is now down to 9%. Still way above 7%. They are way ahead of us in considering the cost of doing business. This is truly a compromise so we didn't even come in with divorcement. We have a very low posture business that is included in this measure. What is really interesting is that the measures from that committee from that state didn't even bring forth opposition. She assumed that was because they were very happy not to have to deal with the whole issue of divorcement. That is what the arrangement was. Divorcement doesn't come in so the measure stays silent when talking about what the cost of doing business shows. We tried not to do that.

They talked about having different approaches - to come in with a very sound bill that they believe is right and one that was recommended by the Committee. She was sorry she didn't bring some others and have a little bit more bargaining power, but she hoped the committee would stay with her on this. They waited two years. It is the product of the Committee and its recommendation. It is already a very good compromise.

HEARING ON HOUSE BILL 261

Presentation and Opening Statement by Sponsor

REP. TOM KILPATRICK, HD 85, Laurel, sponsor, explained HB 261 is an act prohibiting a business from discriminating in the price charged to different purchasers of commodities of like grade and quantity; it provides a method of enforcement; and provides for penalties and remedies for price discrimination; amends several sections; and provides an applicability date. The intent is to make it unlawful to discriminate on a price charged by distributors for commodities of like grade, quality and quantity sold to different purchasers if the effect is to eliminate competition, hurt somebody or create a monopoly. He was a member of the Committee that studied motor fuel pricing and that is where this bill began, but it does not only apply to motor fuel.

The basic idea is on page 1, line 22. It inserts the federal Robinson-Patman Antidiscrimination Act into state law. Attorney General Racicot came to the Interim Committee and said if the federal law could be made a state law, it would help him immeasurably. This is what he wanted. It allows prosecution to be taken in a state court rather than in federal court.

There is a problem with the fiscal note which shows a cost of almost 2/3 of a million dollars a biennium. The first page of the fiscal note, assumption #2, shows the Department of Justice wants

HOUSE OF REPRESENTATIVES

BUSINESS AND ECONOMIC DEVELOPMENT COMMITTEE

ROLL CALL

DATE Feb. 15, 1991

[illegible]

a regularly established dealer or preventing the competition of any person who in good faith intends or attempts to become such dealer, discriminates between different persons or localities of this state by purchasing any article of commerce at a higher rate or price in one locality than in another, after making due allowance for the difference in the actual cost of transportation from the point of purchase to the point of manufacture, sale, storage, or distribution and for the difference in the grade and quality of such article, is guilty of unfair discrimination, which is prohibited and unlawful.

(2) Proof that any person has paid a higher rate or price for any article of commerce in one locality than in another, after making due allowance for the difference in the actual cost of transportation and for the difference in the grade and quality of such article, shall be prima facie evidence of a violation of this section.

(3) The payment of a higher rate or price in one locality than in another, after making such allowance provided above, is not unfair discrimination provided such higher rate or price is paid for the purpose of meeting the rate or price set by a competitor in such locality. The burden of proof of such fact is upon the person charged with unfair discrimination.

History: En. 51-508 by Sec. 8, Ch. 518, L. 1977; R.C.M. 1947, 51-508.

Cross-References

Montana Small Business Purchasing Act,
Montana product preference provisions. Title 18, ch. 5, part 3.
18-1-112.

30-14-209. Sales at less than cost forbidden. It is unlawful for a vendor to sell, offer for sale, or advertise for sale any article of commerce at less than the cost thereof to the vendor or to give, offer to give, or advertise the intent to give away any article of commerce for the purpose of injuring competitors and destroying competition.

History: En. 51-509 by Sec. 9, Ch. 518, L. 1977; R.C.M. 1947, 51-509.

Cross-References

Unlawful practices, 30-14-103.

30-14-210. Cost survey as evidence of cost. Whenever a particular trade or industry, of which the person complained against is a member, has an established cost survey for the locality in which the offense is committed, such cost survey is competent evidence to be used in proving the costs of the person complained against.

History: En. 51-510 by Sec. 10, Ch. 518, L. 1977; R.C.M. 1947, 51-510.

30-14-211. Establishing cost survey. (1) The department shall, whenever application has been made by 10 or more persons within a particular trade or business, establish the cost survey provided for in 30-14-210. When petition for a cost survey has been so presented to the department, the department shall, as soon as possible, fix a time for a public hearing upon the question of whether the cost survey should be established and, if so, upon the matter of establishing such cost survey. The hearing shall be held at the office of the department and upon that notice which the department may require by rule. However, notice of the hearing shall be published for at least 2 successive weeks in the daily newspaper or newspapers as the department may designate as most commonly circulated in the counties to be affected by the

Flying J Sold Fuel Too Cheap, Says Van Dam

By Cherrill Crosby
Tribune Staff Writer

The Utah Attorney General's Office filed a civil lawsuit Wednesday against Flying J Petroleum Inc., alleging the company violated the Utah Motor Fuel Marketing Act in June by selling gasoline and diesel below cost.

"This is the first in a series of cases, I believe, where we're going to show there is a move afoot by certain retailers to really do harm to the independents and therefore eliminate competition," said Attorney General Paul Van Dam.

The complaint filed in 3rd District Court is the first in a three-pronged investigation into allegations of below-cost selling, price gouging and price fixing, said Art Strong, chief of the office's Fair Business Enforcement Unit.

"We have a couple more cases where the investigation is nearly complete. And they could result in additional actions being filed," Mr.

Strong said.

The suit alleges Flying J, which is headquartered in Brigham City, sold gasoline and diesel fuel below cost — the wholesale prices of fuel with a 6 percent markup — on several days in June through an Ogden retail outlet just off Interstate Highway 15.

The sales injured the Delaware corporation's competitors by forcing them to choose between losing money by also selling below cost, or continuing to sell at or above cost and losing revenues from reduced sales, Mr. Strong said.

Flying J operates an oil refinery in North Salt Lake and retail fuel outlets in Utah and neighboring states.

The complaint seeks a permanent injunction against further below-cost sales and a fine of not more than \$5,000 for each retail sale of fuel below cost.

State prosecutors contend Flying J's sales would eventually force competitors to abandon the retail gasoline and diesel fuel business, especially small competitors who cannot use profits from sales in other markets to offset losses incurred from meeting Flying J's below-cost prices.

"I don't want people to think that our office objects to gasoline dealers giving motorists a better price on gasoline," Mr. Van Dam said. But, if

fuel is sold below cost, "it is going to be very clearly disadvantageous" to small independents whose profit margin is determined by the volume they sell.

"In order to preserve competition, everybody's got to at least play on that level playing field where, there is a [minimum] 6 percent markup," he said.

The suit contends Flying J's below-cost pricing would force small fuel retailers, not affiliated with any company operating an oil refinery, out of the retail fuel industry before larger retailers or ones affiliated with a refinery are forced from the marketplace.

Government Sues With Families
Of

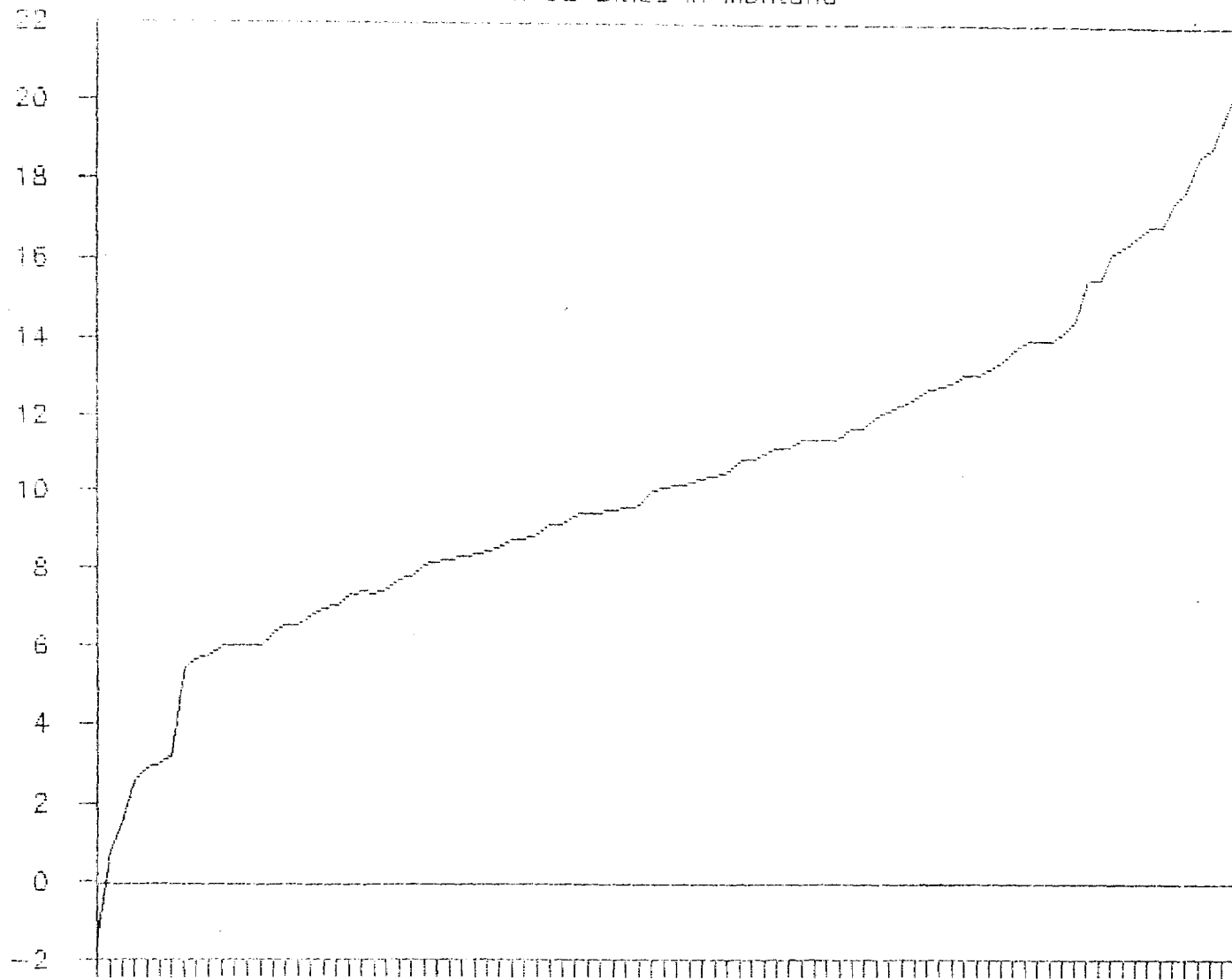
Dickson W:

EXHIBIT 3
DATE 2-15-91
HB 538

Margin on Unleaded Gasoline

In 92 Cities in Montana

Margin in cents per gallon



Cities Represented Individually

EXHIBIT 3
DATE 2-15-91
HB 238

Exhibit 3

EXHIBIT 3

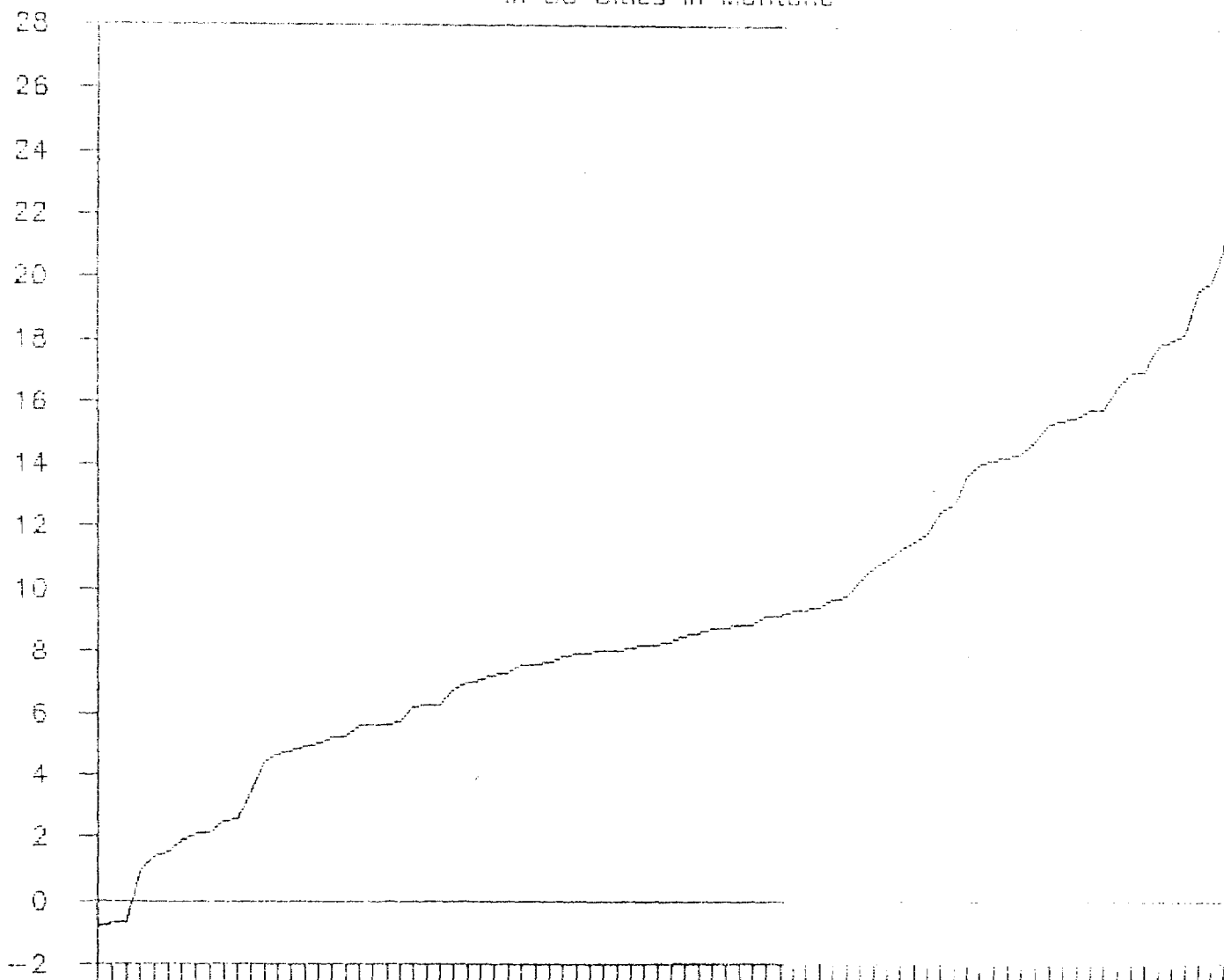
DATE 2-15-91

HB 530

Margin in cents per gallon

Margin on Diesel Fuel

in 85 Cities in Montana



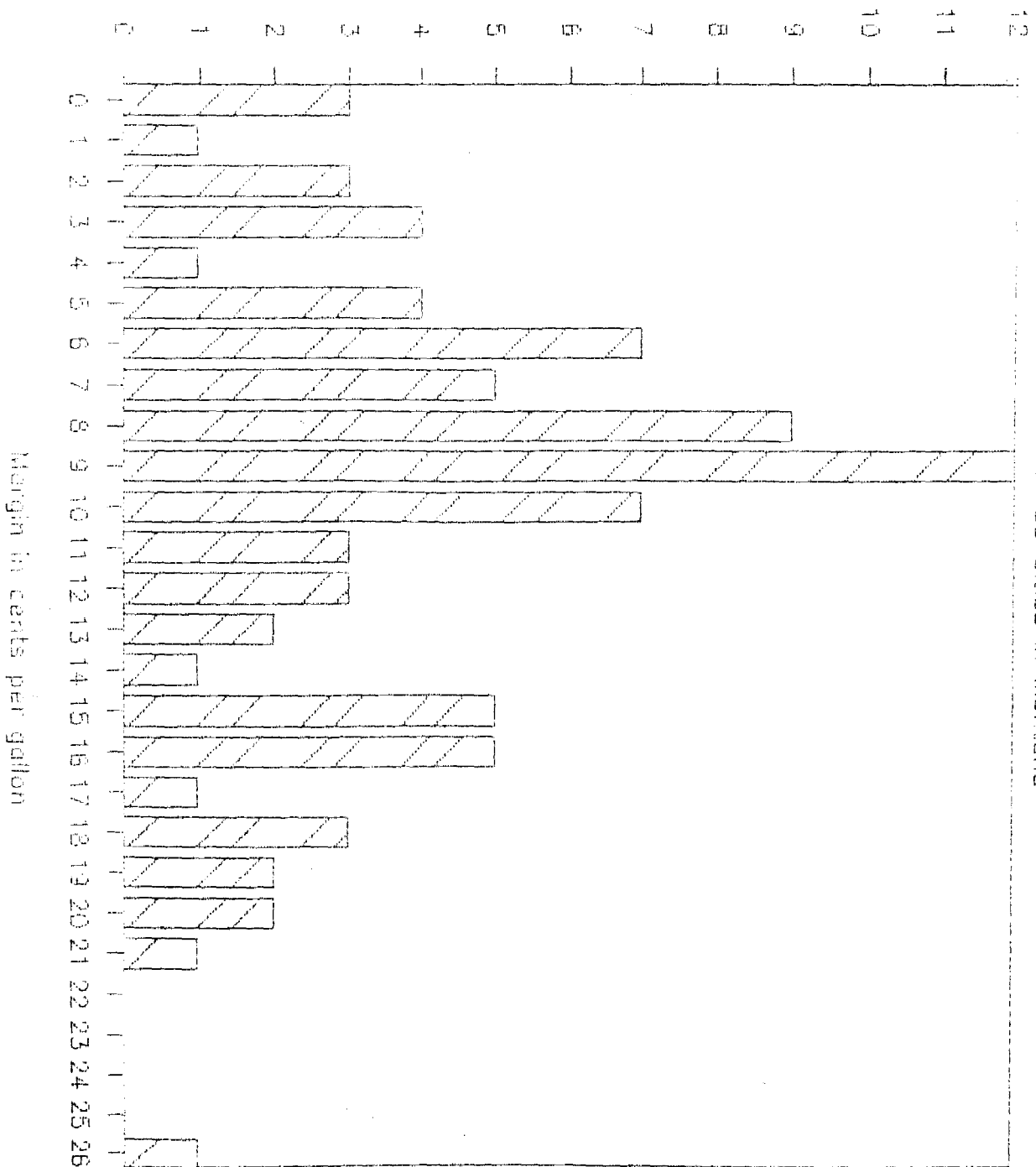
Cities Represented Individually

Number Of Cities With Respective Margin

EXHIBIT 3
DATE 2-18-91
HB 538

Margin on Diesel Fuel

In 85 Cities in Montana

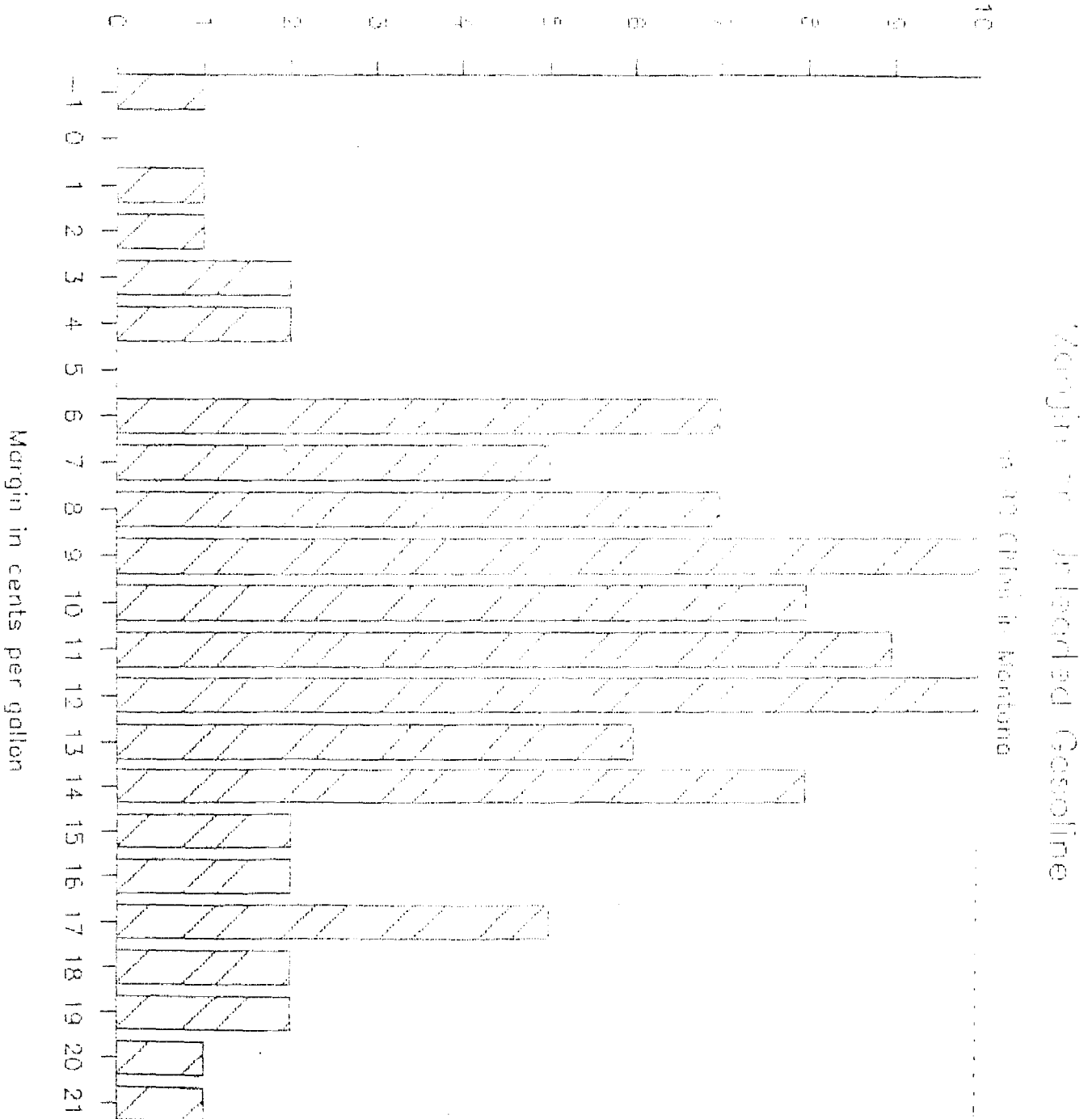


Number Of Cities With Respective Margin

EXHIBIT 3

DATE 2-18-91

HB 538



AVERAGE PER GALLON MARGINS REPORTED
BY GASOLINE DEALERS

As Compiled from Returns in May 1990 Survey

EXHIBIT 3A
DATE 2-15-91
HB 538

\$ Per Gallon

Regular Gasoline

	Margin Reported <u>4/24/90</u>
Billings	.0744
Bozeman	.0554
Butte	.0718
Choteau	.0738
Culbertson	.1249
Cut Bank	.0754
Deer Lodge	.0838
Drummond	.1328
Glasgow	.0598
Glendive	.0539
Great Falls	.0054
Hamilton	.1137
Hardin	.0847
Havre	.0300
Helena	<u>-.0146</u>
Kalispell	.0680
Laurel	.0844
Lima	.1789
Livingston	.0498
Malta	.0778
Miles City	.0573
Missoula	.0734
Polson	.0289
Shelby	.1098
Sidney	.0533
Thompson Falls	.1114
West Yellowstone	.1564
Whitefish	.0647
Wisdom	<u>.1859</u>
Wolf Point	.0729

EXHIBIT 3B *Exhibit 3B*
 DATE 2-15-91
 HB 538

**MOTOR FUELS DEALERS'
 BREAK-EVEN MARGIN REQUIREMENTS**

Source: Responses to mail survey, May 1990, of selected
 representative dealers throughout Montana

Full Service Stations:

<u>\$</u> <u>Margin</u> <u>Needed</u>	<u>No. of</u> <u>Stations</u>
.073	1
.080	1
.100	6
.120	2
.146	1
.148	3
.150	3
.160	1
.200	2
.260	2
.300	5

.173 Average

Convenience Stores:

<u>\$</u> <u>Margin</u> <u>Needed</u>	<u>No. of</u> <u>Stations</u>
.050	1
.053	1
.055	1
.059	1
.060	3
.068	3
.070	1
.076	4
.080	2
.083	4
.084	1
.085	4
.100	34
.120	3
.128	2
.150	2

.090 Average

Truck Stops:

<u>\$</u> <u>Margin</u> <u>Needed</u>	<u>No. of</u> <u>Stations</u>
.060	1
.070	1
.078	1
.080	1
.104	1
.110	1
.150	2

.100 Average

Other Retail Outlets

<u>\$</u> <u>Margin</u> <u>Needed</u>	<u>No. of</u> <u>Stations</u>
.060	6
.070	4
.080	5
.100	8
.110	1
.118	2

.080 Average

[Through June 8 returns]



MONTANA PETROLEUM ASSOCIATION

*A Division of the
Rocky Mountain Oil and Gas Association*

Helena Office
2030 11th Avenue, Suite 23
Helena, Montana 59601
Phone (406) 442-7582
Fax (406) 443-7291

Janelle K. Fallan
Executive Director

EXHIBIT 4
DATE 2-15-91
HB 538

Billings Office
The Grand Building, Suite 510
P.O. Box 1398
Billings, Montana 59103
Phone (406) 252-3871
Fax (406) 252-3871

**Testimony by
Janelle Fallan
Montana Petroleum Association
In opposition to HB 538**

This bill is an attempt to regulate the price of gasoline. It is simply unnecessary and it establishes a dangerous precedent in public policy in Montana.

This bill will say to Montanans that we are going to establish a floor on prices of motor fuel and thus guarantee a profit for a small group of people at the expense of Montana consumers who depend upon motor fuel for their livelihood.

An interim committee looked into the issue of predatory pricing and found no evidence. The Attorney General investigated charges of discriminatory pricing during 1990 and found no evidence.

Motor fuel marketing is a highly competitive business. It is that competition that best serves the consumer, assuring that supplies are available and at a competitive price.

This legislation would penalize the efficient operator, who may not need the government to set prices to be profitable. The efficient business operators under this bill will have to prove his innocence from accusations of predatory pricing to be able to charge the consumer less at the pump.

The bill in its present form is vague and needs amendment if you are to approve it. The questions I will raise should be resolved or the bill will certainly have tough sledding in this body, the Senate and likely the courts.

QUESTIONS

+The purpose clause references "independent and small dealers," but there is no definition of just who these people are.

+There is also no definition of "subsidized pricing" referenced on line 3, p. 2.

Along those same lines, isn't guaranteeing a profit for undefined independent and small dealers subsidized pricing for them at the expense of the customer or consumer?

+The purpose section also states that subsidized pricing reduces competition in the motor fuel marketing industry. However, if a floor is established -- a minimum profit guaranteed -- wouldn't this bring in more competition to the so-called independent and small dealers and thus drive many of them out of business?

+Next, consider the sentence in lines 6 and 7 (p.2) which says: The purpose of (Sections 1-7) is to prevent and eliminate predatory pricing of retail motor fuel."

This sentence appears to assume that predatory pricing exists and this bill will both prevent it and eliminate.

As to the bill itself -- how was the formula derived to obtain the so-called "cost of doing business" (lines 14-19, p. 2.)? Are 3% and 6% standard numbers or were they arbitrarily placed in the bill? The subcommittee also considered margins of 1% on wholesale and 8% on retail.

The words "in the absence of proof of lesser cost" -- what does this mean? Who proves it? How is this mechanism triggered?

+P. 5. New section 4 of the bill:

Lines 22-24 are part of the formula prohibiting below-cost sales. However, the words "if the effect is to injure or destroy competition or substantially lessen competition" raise a number of questions. The language is inconsistent, awkward and vague. The same holds true for subsections 2 and 3.

+Sections 6 and 7, page 8, are most confusing and we ask the following questions:

- Who determines the enforcement of this act?
- In the case of the Department of Commerce, who will investigate and determine that action occur?
- What mechanism exists in the Department of Commerce to comply with this section? How many people will investigate? Who determines when to bring charges? What role will the County Attorney have? Will he investigate? Will the state reimburse him for investigation and prosecution?

Since the decontrol of oil prices at the federal level in 1981, there have been significant changes in the way gasoline is marketed. Consumers have increasingly sought the most competitive prices available, which are usually found at high volume, self serve outlets. This has forced those who sell motor fuel to change the way they do business or risk loss of market share.

While most gasoline marketers have adapted to the new operating environment, some have responded by asking for government intervention and protection from their competitors. They ask for and support legislation of this kind as a means of forcing prices upward in order to subsidize inefficient operating practices.

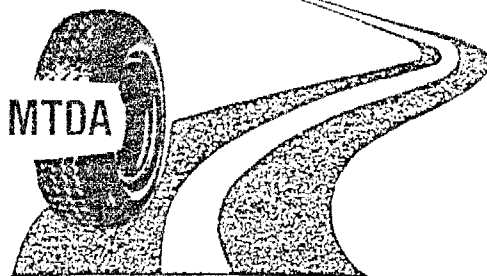
As I noted earlier, the interim subcommittee found no evidence of predatory pricing. If there should be problems of this kind in the future, protection is already provided by federal anti-trust laws. the Federal Trade Commission and the Federal Petroleum Marketing Practices Act.

If there is so-called predatory pricing, who is doing it? Most of the marketing in Montana is by independent wholesalers and retailers, -- not by major oil companies. This bill guarantees those wholesalers and retailers a profit margin. It protects these wholesalers and retailers from their own competition.

This bill:

- + fails to consider differences in overhead and operating expenses between different types of retail outlets.
- + is anti-competitive and anti-consumer.
- + is an arbitrary and discriminatory device to fix prices.
- + restricts the right of a seller to price competitively.
- + protects the high-cost operator.
- + will force Montanans to pay higher prices to subsidize inefficient operators.

In conclusion, there is good evidence that passage of this bill will lead to higher motor fuel prices for Montanans. I respectfully submit that your constituents may not support higher gasoline prices.



Service is our only product!

MONTANA TIRE DEALERS ASSOCIATION

318 N. Last Chance Gulch

P.O. Box 440

Helena, Montana 59624

(406) 442-3388

1-800-527-8065

TESTIMONY

FEBRUARY 15, 1991

ROOM 312-3

HB 538

EXHIBIT 4A
DATE 2-15-91
HB 538

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

FOR THE RECORD, I AM CHARLES BROOKS EXECUTIVE VICE PRESIDENT OF THE MONTANA TIRE DEALERS ASSOCIATION. I AM HERE TODAY IN OPPOSITION TO HB 538.

THIS PROPOSED LEGISLATION LAYS THE AX AT THE VERY ROOT OF THE FREE ENTERPRISE SYSTEM AND THE FREE MARKET PLACE. BY LEGISLATION WE ARE MOVING FROM A FREE MARKET PLACE SYSTEM TO A GOVERNMENT CONTROLLED MARKET PLACE. BY MANDATING CERTAIN PROFIT LEVELS. IT HAS NOT WORKED IN THE PAST AND I SUGGEST TO YOU THAT IT WILL NOT WORK NOW ARE IN THE FUTURE. LET ME SHARE WITH YOU MY EXPERIENCE AS A RETAIL MERCHANT OPERATING WITH PRICE CONTROLS. IN THE 1970'S RETAILERS COULD NOT SELL MERCHANDISE BELOW 5% ABOVE COST. WE WERE JUST GETTING OUR BUSINESS STARTED AND NEEDED TO BUILD VOLUME IN A HURRY SO WE BEGAN TO MAKE VARIOUS DEALS WITH MANUFACTURES TO RUN VERY GOOD PRICES ON HIGHLY CONSUMABLE ITEMS. IN SHORT ORDER WE HEARD FROM THE DEPARTMENT OF COMMERCE, THAT A COMPLAINT HAD BEEN FILED AGAINST OUR PRICING PRACTICES THAT WE WERE SELLING BELOW THE 5% LAW. THEY ASK FOR RECORDS TO SUPPORT THE PRICE AND OUR ACCOUNTANT WOULD FIND THE NECESSARY RECORDS AND SEND THEM TO HELENA. THEN A LETTER WOULD BE RECEIVED FROM THE DEPARTMENT CLEARING US OF THE VIOLATION. THIS WENT ON FOR SEVERAL YEARS AND ONE DAY I CALLED THE DEPARTMENT AND ASK WHAT WOULD HAPPEN IF WE SOLD MERCHANDISE BELOW THE 5% LAW, AND HIS RESPONSE WAS A LETTER ASKING US NOT TO DO IT AGAIN. SOMETIME IN THE 1970'S THIS LAW WAS REMOVED FROM THE BOOKS. BECAUSE IT DID NOT WORK.

LET ME SUGGEST TO YOU THAT A REVIEW OF THE MILK CONTROL PROBLEM ALSO BE CONSIDERED BEFORE YOU BRING ANOTHER COMMODITY, UNDER GOVERNMENT CONTROL.

THE FREE COMPETITIVE ENTERPRISE SYSTEM BUILT THIS GREAT NATION OF OURS - A FREE MARKET PLACE HISTORICALLY HAS BENEFITED BOTH THE MERCHANT AS WELL AS THE CONSUMER. THE FREE MARKET PLACE CONTINUES TO BE THE BEST PLACE TO SET PRICE OF GOODS AND SERVICES.

MANY OTHER MERCHANTS ARE COMPETING IN FIELDS WHERE PROFIT MARGINS ARE VERY THIN, SHALL WE ALSO ASSURE THEN A SET PROFIT MARGIN??? I WOULD SUGGEST TO YOU THAT A NUMBER OF GOVERNMENTS HAVE TRIED IT, AND HAVE FAILED. BY LEGISLATION OR REGULATIONS WE ARE ATTEMPTING TO REMOVE ALL THE RISK OF DOING BUSINESS AND ASKING SOMEONE ELSE TO PAY THE BILL. AND IN THIS CASE THE CONSUMER WILL PICKUP THE TAB.

2-15-91
AB 538

I WOULD LIKE NOW TO ADDRESS A SECTION OF THE BILL. PAGE 8 SECTIONS 6 AND 7. WE ARE REQUIRING THE DEPARTMENT OF COMMERCE OR A COUNTY ATTORNEY TO ENFORCE THIS PROPOSED LEGISLATION. WE MUST ASK THE QUESTION WILL EITHER OF THESE OFFICES HAVE THE TIME, MAN POWER OR BUDGETS TO HANDLE THIS TYPE OF ENFORCEMENT ??? I THINK NOT. THEN IS THIS LEGISLATION REAL NECESSARY???

I URGE YOU TO GIVE THIS BILL A DO NOT PASS.

THANK YOU FOR THE OPPORTUNITY TO PRESENT THIS TESTIMONY.

EXHIBIT 5
DATE 2-15-91
HB 538

Exxon 4-15-91

Exxon Statement on HB 538
Before the Montana House of Representatives
Committee on Business and Economic Development
February 15, 1991

This statement is submitted by Exxon Company, U.S.A. for the hearing record on HB 538, regulating the price of retail motor fuel at wholesale and retail levels. This bill would place a floor under prices paid by motorists when they buy gasoline from any source, whether from a retailer, wholesaler, or an integrated refiner. Exxon is opposed to this bill because it represents an attempt to guarantee the profits of a small group of marketers at the expense of higher motor fuel prices for the motoring public and the rest of the business community.

Further, the dealers and distributors who support this legislation are not likely to benefit from these higher prices for long. Finally, the bill is unnecessary to protect the legitimate interests of Montana dealers and distributors and it would be operationally unwieldy for all the marketers to whom it might be applied.

Attempt to Guarantee Profits

The major premise behind this bill appears to be the assumption that there is something wrong with the way motor gasoline is priced in Montana. Exxon believes that the Montana motor fuel market is highly competitive and that this competition benefits the consumer. In a competitive marketplace, there will be winners as well as losers, those who operate inefficiently eventually falling by the wayside. This is the basic nature of competition and its results have, over time, provided our citizens with the highest quality products and services at the lowest possible cost.

This bill intrudes upon the efficient working of the marketplace by placing a floor under the prices that retailers, wholesalers and integrated refiners may charge their customers. In essence, retailers would be required to mark up the motor fuel they sell by at least 6% and wholesalers by at least 3%. Wholesalers and retailers would be required to abandon the market-based pricing which has benefitted consumers, and replace it with cost based pricing, which ignores market forces and, ultimately, discourages efficiency. While no marketer can sell below cost over the long run and remain in business, in the short run all marketers must set their prices at marketplace levels and find a way to control their costs in order to make a profit.

Clearly, the bill's intent is to replace the give-and-take of

competition and the efficiency motivation of today's motor fuel marketplace, with a system that requires marketers to recover today's costs with today's prices and gives little incentive for improved efficiency. The only beneficiaries of such a change will be inefficient marketers, while the price of their inefficiency will be paid by Montana motorists.

Raise Motor Fuel Prices

The likely outcome of enactment of this bill will be higher motor fuel prices for consumers and small businesses. A 1985 study the U.S. Department of Energy (DOE) concluded that such laws cost the consumer over \$600 million in 1982 alone.

A more recent study of the impacts of state below cost selling laws in Alabama, Georgia, and Florida was completed by the American Petroleum Institute in December 1987. Briefly, in a before and after comparison of retail gasoline prices in these states with neighboring states without below cost selling prohibitions, the study concluded that such laws raised the retail price of gasoline sold by refiners between 1.4 cents and 2.1 cents per gallon. Prices charged by distributors rose between 1.9 cents and 5.7 cents per gallon in the twelve months following enactment of each state's below cost selling prohibition. Should similar increases occur in Montana, this bill could cost the state's motorist as much as \$24 million dollars annually.

Won't Provide Any Benefits

In our view, this legislation will not provide any additional long term benefits to those who support it. According to a DOE study of deregulated gasoline marketing, the higher prices resulting from below cost selling laws would not benefit the existing dealers and distributors in the long run because higher than competitive prices would attract more competition which would reduce the volume sold by existing marketers. While higher consumer prices and higher unit margins for dealers and distributors would likely remain, any increase in profits for marketers would quickly vanish due to lower volumes.

UNNECESSARY

This bill is clearly unnecessary to protect the legitimate business interest of independent motor fuel marketers. These merchants are already protected against unfair pricing or other unfair marketing practices of their suppliers by a large body of law including the Montana Unfair Trade Practices Act, the Sherman Act, Clayton Act, Robinson-Patman Act, and the Federal Trade Commission Act.

Some marketers have maintained that these existing laws do not work. This is simply not the case. When government agencies believe that anticompetitive actions are taking place, they have not been reluctant to initiate investigations and, eventually, litigation. Using present laws, the Federal Trade Commission,

various state attorneys general including Montana's, and individual dealers have worked within the administrative and court systems to seek redress. With all of these laws already on the books, there is no need for additional legislation.

Summary

In summary, Exxon believes these amendments are unnecessary, and almost certain to result in higher motor fuel prices to motorists without any long term benefit to those who support it. We urge the committee to reject House Bill 538.

DMS

2/8/91

Presented by Don White

COMMENTS OF CHEVRON CORPORATION
IN OPPOSITION TO HB538

EXHIBIT 6

DATE 2-15-91

HB 538

Exhibit #6

Mr Chairman and members of the committee on Business and Economic Development. My name is Ward Shanahan I represent Chevron Corporation. Chevron opposes HB 538 because legislation of this kind is anti-competitive and anti consumer.

While the bill is styled as a "sales below cost measure designed to prevent subsidized below cost pricing at the retail level by dealers and distributors who have other sources of income" its real purpose is to shield service station dealers from price competition.

Montana already has an Unfair Trade Practices Act(Section 30-14-201 M.C.A. et seq) which includes aprohibition of sales below cost"for the purpose of injuring competitors or destroying competition." HB 538 is specifically directed against refiners who are included in its definition of "wholesaler". In addition it "fixes" the cost of doing business for wholesalers at 3% and for retailers at 6% unless "proof" of actual costs is made. However this is proof is not the "actual costs" but only those costs specified in the bill.

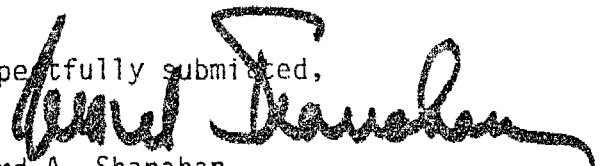
While Chevron opposes price fixing legislation, if the committee is intent on passing this bill, then the following amendments should be made:

- (a) The present Unfair Trade Practices Act should be repealed and replaced with this bill. To do otherwise is to create confusion in an already complicated area of the law.
- (b) Section 7 of the bill should be amended to give the refiner or "wholesaler" prior notice and an opportunity to be heard before the Department of Commerce issues a cease and desist order. Oil Companies should have due process rights also.
- (c) Refiners and other sellers should be allowed an adequate "meeting competition" defense. The following language should be included:

"A wholesaler or retailer may advertise, offer to sell, or sell motor fuel at a price made in good faith to meet the price of a competitor who is rendering the same type of service and is selling the same article at cost."

We will be available to work with the sponsors or the committee to make the appropriate changes.

Respectfully submitted,



Ward A. Shanahan
for Chevron Corporation
301 First Bank Building
P.O. Box 1715
Helena, Montana 59624
Tel: (406) 442-8560

EXHIBIT 6A
DATE 2-15-91
HB 538

Empirical Examination of Allegations of "Below-Cost" Retail Selling of Gasoline by Refiners

RESEARCH STUDY #038
OCTOBER 1986

American Petroleum Institute
1220 L Street, Northwest
Washington, D.C. 20005



House Bus. & Econ Development

EXHIBIT 6 B

DATE 2-15-91

RE 538

Gasoline Marketing in the 1980s: Structure, Practices, and Public Policy

Prepared by

Temple, Barker & Sloane, Inc.

May 1988

HOUSE OF REPRESENTATIVES
VISITOR REGISTER

Business & Economic Dev.

COMMITTEE

BILL NO. HB 538

DATE Feb. 15, 1991

SPONSOR(S) Rep. Bradley

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Charles R. Brooks	MT Tire Dealers Assoc		✓
Jan Cool	Exxon		✓
WARD SHANAHAN	NEWEN/STILLWATER MINE / P.M.		✓
Stephen D. Vision	WPM A	✓	
Jerry Noble	SD 21		✓
Janette Fallon-Hua	Mt Petroleum Ass'n		✓
Bonnie Alexander	mt. Petroleum Marketers	✓	
JAMES TWISLER	MT Chambers		✓
JOHN TAGGART	A.T.O.M.	✓	
Tom LeLand	A.T.O.M.	✓	
ARON MARTIN The Pick Skewis	ATOM	✓	
BETTIE TAGGART	ATOM	✓	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

percentage is young people under 18 years of age. Seniors demand a great deal more care.

REP. CROMLEY said that there was much opposition to the bill originally, including the AARP, but the opposing groups have not been heard from since the amendments were made, so he was uncertain how these people feel about the bill in its amended form.

REP. BENEDICT, stated that the amendments did help the bill, but there is another area of perception that many have not mentioned. For instance, young doctors coming to Montana to take the place of retiring doctors would not care for this bill and would, perhaps, not relocate because of this bill.

REP. SCOTT said this is a misconception. This bill sets the prices for Medicaid, but doctors do not have to choose patients on Medicaid if they decide not to. REP. LARSON stated that Medicaid costs were slated to raise 34% in 1992. This could make it very attractive to practicing medicine in rural communities.

REP. RICE maintained the bill has been "skinnied" down as much as possible. It's a tough bill, but a needed bill in Montana.

Vote: Motion FAILED on a tie vote with REPS. BARNETT, BENEDICT, CROMLEY, ELLIS, HANSON, KNOX, TUNBY, WALLIN, and BACHINI voting No. Roll call vote # 1.

Motion/Vote: REP. CROMLEY moved HB 350 be tabled. Motion FAILED on a tie vote.

Mr. Verdon stated that House Rule 30-40, subsection 3, states that the Committee will not report a bill to the House without recommendation. If a bill is withdrawn from a Committee and brought to the House floor without a Committee recommendation, the bill must include amendments only adopted by the Committee action as reflected in Committee hearings for debate on Second Reading.

REP. BACHINI said the Committee cannot report this bill without a recommendation, however, the House members can vote to bring it out with 60% of the membership.

Motion/Vote: REP. BENEDICT moved HB 350 be tabled. Motion FAILED on a tie vote (9-9)

No further action was taken on HB 350 at this time.

HEARING ON HOUSE BILL 538

Motion: HB 538 do pass.

Motion: HB 538 be amended. (See Standing Committee Report dated 2/18/91.

Discussion: Steve Juskin, Past President Western Petroleum Association, said there are two primary sections to this bill. One is to change the cost of doing business for a wholesaler from 3% down to 1%. Amendment No. 1 is a housekeeping amendment basically because one of the paragraphs later on gets eliminated. The second amendment, on page 2, line 15, strike 3%, insert 1%. Page 7, line 14, following the word "same", strike "article at cost" and it becomes "or a similar product of like grade and quality". Number 3, strikes from "is" to rendering the same type of service and is. So that sentence, when it is modified reads "A wholesaler or retailer may advertise, offer to sell, or sell motor fuel at a price in good faith to meet the price of a competitor who is selling the same or a similar product of like grade quality". Those were amendments 3 and 4. Amendments 6 inserts the following paragraph, "upon presentation by an offended party of evidence of a violation of section 4, the Department of Justice or a County Attorney shall issue to the suspected retailer or wholesaler a demand by certified mail to cease the violation. If the violation is not corrected within 24 hours after the suspected retailer or wholesaler receives the notification, the Department or County Attorney may bring an action to enjoin the violation." Upon conviction, a retailer or wholesaler is subject to a civil penalty of not more than \$1000 per day. If the action is brought by the Department of Justice, one-half of the amount of the penalty must be deposited in the general fund of the county where the action was brought and the remainder in the state general fund or if it is brought by a County Attorney, the entire amount of the penalty must be deposited in the General Fund of the county where the action was brought.

Beth Baker, Assistant Attorney General, Department of Justice, said if this is the Legislature's intent, to have the Department of Justice enforce these provisions, they would be glad to take on that responsibility provided that they have the resources to do it with. She said she thought this bill was consistent with the other antitrust proposals that are before the Legislature, which are designed to put antitrust enforcement either on a private level or in the Department of Justice. She said this bill does not provide any private remedy so the enforcement would be exclusively with County Attorneys and the Department of Justice. For that reason, unlike HB 261 which did provide for private enforcement, she said she thought there would have to be an allocation of resources to whatever state agency ultimately ends up with this responsibility.

REP. ELLIS said the penalty goes to the state and general fund and, as a result, the Department of Justice gets no money. He asked Ms. Baker what kind of funding should thought this would require?

Beth Baker said the fiscal note prepared by the Department of Commerce included 3 FTEs. The fiscal note prepared by the Department of Justice for other antitrust legislation included 3

FTEs. Our fiscal note was approximately \$250,000 for the biennium on the other antitrust bill.

REP. ELLIS asked if can 3 FTEs could handle this? Will it be cumulative and should there be some funding here?

Beth Baker said, assuming that this bill stands on its own, some funding would be necessary. We would have no staff to undertake any enforcement.

Vote: Motion to amend CARRIED unanimously.

Motion: REP. PHILLIPS moved HB 538 be amended with regard to a ceiling on prices and a floor.

Discussion: REP. KILPATRICK said a business selling gasoline when they are in competition with others, they have to have a certain percentage to break even. If it is a regular business that does not have a convenience store, they go up to 17 or 18 cents to make it. At the low, it would cost 7 cents. If you have a convenience store, they take about 5 percent to make it. The point is that at one percent a business would force another average business out.

REP. LARSON said this bill is intended to get after the big companies that undertake predator pricing mechanisms to drive the competition out. It is a bill that small independent retailers need and he encouraged the members to oppose the amendment and pass the bill out with a do pass recommendation.

Vote: Motion to amend FAILED.

Discussion: REP. CROMLEY said it is difficult to see how it would be good for the consumer to set a minimum price and a minimum profit on selling something. The grocers have not asked for a break and groceries are more important than gasoline.

REP. BARNETT said a benefit to the consumer would be to drive out all the competition and then the prices would go up drastically and this bill gives consumer protection against that.

REP. ELLIS said he talked to poll service stations and all perceived some problem in this area.

Motion/Vote: HB 538 do pass as amended. Motion CARRIED with REPS. KNOX, BENEDICT, STEPPLE, CROMLEY, HANSON AND BACHINI voting no.

REPORT FROM SUB-COMMITTEE ON HB 169

REP. DOWELL said a consensus was not reached on this bill. Some discrepancies were noted however. Loggers would bring logs into the mill and they thought they were being given credit for fewer logs than they had. They wanted the state to set up some way of

BUSINESS AND ECONOMIC DEVELOPMENT COMMITTEE

DATE Feb 18, 1991

[illegible]

HOUSE STANDING COMMITTEE REPORT

February 18, 1991

Page 1 of 2

Mr. Speaker: We, the committee on Business and Economic Development report that House Bill 538 (first reading copy -- white) do pass as amended .

Signed: Bob Bachini
Bob Bachini, Chairman

And, that such amendments read:

1. Page 1, line 15.

Page 2, lines 6 and 9

Page 6, line 11

Page 8, line 4

Strike: "7"

Insert: "6"

2. Page 2, line 15.

Strike: "33"

Insert: "13"

3. Page 7, lines 13 and 14.

Following: "is" on line 13

Strike: remainder of line 13 through "is" on line 14

4. Page 7, line 14.

Following: "same"

Strike: "article at cost"

Insert: "or a similar product of like grade and quality"

5. Page 8, line 6.

Following: "Penalty"

Insert: "-- disposition"

6. Page 8, line 7.

Strike: ", and upon"

Insert: "."

(2) Upon presentation by an offended party of evidence of a violation of [section 4], the department of justice or a county attorney shall issue to the suspected retailer or wholesaler a demand by certified mail to cease the violation. If the violation is not corrected within 24 hours after the suspected retailer or wholesaler receives the notification, the department or the county attorney may bring an action to enjoin the

violation.

(3) Upon "

Renumber: subsequent subsection

7. Page 8, line 10.

Following: "occurs"

Insert: ", is liable for attorney fees, and is subject to
injunctive relief"

8. Page 8, line 11.

Strike: "commerce"

Insert: "justice"

9. Page 8, line 12.

Following: "4]."

Insert: "If the action is brought by:

(a) the department of justice, one-half of the amount
of the penalty must be deposited in the general fund of the
county where the action was brought and the remainder in the
state general fund; or

(b) a county attorney, the entire amount of the penalty
must be deposited in the general fund of the county where
the action was brought."

10. Page 8, lines 13 through 22.

Strike: lines 13 through 22 in their entirety

Renumber: subsequent sections

fourteen deals with.

Beth Baker replied title thirty, chapter fourteen, contains Montana's unfair trade practices act, the consumer protection act, the uniform trade secrets act, and the motion picture fair trade practices act. It has a wide variety of remedies. As the bill is drafted right now, it says that title thirty, chapter fourteen may apply to this, it is unclear which provisions of this chapter would apply.

Senator Gage asked if the definition of commodity is in the code.

Beth Baker replied that there is not a definition of commodity in the codes.

Senator Lynch asked Beth Baker what her feelings on the amendments from Steve Visocan.

Beth Baker stated that she would hesitate putting the amendment in, because with the bill that it is presently worded you can rely on the federal law to help us interpret it.

Closing by Sponsor:

Representative Kilpatrick closed by saying that it was noted that this originally started off with oil and petroleum products. Mr. Browning was here, and he had an amendment that he wanted to submit he had to leave to Representative Kilpatrick submitted it to Bart Campbell. Senator Bengtson will carry the bill to the floor if it passes.

HEARING ON HOUSE BILL 538

Presentation and Opening Statement by Sponsor:

Representative Dorothy Bradley, sponsor of the bill, stated that this is a repeat of what was brought before this committee two years ago. At that time, there was a study done for what appeared to be below cost sales taken place for retail motor fuels area in the state of Montana. Section 30-14-201 states that it is unlawful in the state to sell an article of commerce of less of the cost if it is for the purpose of injuring competitors and destroying competition. The sole intent of the bill is to try to figure out what below cost is.

Proponents' Testimony:

Senator Esther Bengtson stated that she was the chairman of the interim committee. We became convinced that this was the least that they could do. This is not a price setting, profit fixing bill. It merely defines the cost of doing business. So there is a person or business who feel that they have been injured they can take it to court. This is a fair and reasonable consumer piece of legislation.

Ronna Alexander, representing the Montana petroleum marketing association, stated that there was a lot of background to the study that was done in this committee (See Exhibit 2).

John Taggart, representing the service station association,

stated in the hearing that they had last summer the refiners were unable to successfully defend their positions on pricing. One refiner that they took to task, they pulled all of his stations on interstate ninety on a specific day, and the Montana price for a Billings refinery was ninety four cents a gallon retail, the same company in Spokane, Washington on the same day was selling the Billings refined gas at a retail price of seventy seven cents per gallon.

Larry Fosbender, representing the Montana council of cooperatives, stated this legislation is important as far as the long term is concerned that it be put into place to protect the consumers.

Steve Visocan, past president of the western petroleum marketer's association, he passed out a fact sheet that answers some of the important questions in regards to this bill (See Exhibit 3).

Beth Baker, representing the department of justice, stated that she has the same concern for this bill as she did for the previous one. There is a prohibition for below cost sales already in the unfair trade practices act. With this bill providing a second remedy provision, there may be some confusion or overlapping remedies. She proposed to put this bill into the unfair trade practices act (See Exhibit 4).

Ron Leland, representing the automotive trades of Montana, stated that the service station dealers in Montana is a small business.

Opponents' Testimony:

Janelle Fallan, executive director of the Montana petroleum association, spoke in opposition of the bill (See Exhibit 5 and Exhibit 5A).

Bill Dermott, consumer and regulatory affairs manager for the Exxon company, spoke in opposition of the bill (See Exhibit 6).

Kay Norenberg, representing women involved in farm economics (WIFE) and the Montana cattle women, stated that agriculture has been having a difficult time. If this bill was to pass, it would cause even higher costs for agriculture. It allows for the raising of the prices for the consumer as high as the operator wants, but restricts how low he can sell his product. This is an anti-consumer piece of legislation.

Senator Larry Tveit stated that HB 538 will raise prices to the consumer. It will raise the price for agriculture, and he doesn't think that is necessary.

Charles Brooks, executive vice president of the Montana tire dealer's association, spoke in opposition of the bill (See Exhibit 7).

James Tutwiler, Montana chamber of commerce, stated that if we select this bill it will concern jobs in Montana. They find no compelling evidence that the jobs are at stake. In the absence of a clear problem, we are looking at a legislative remedy which crosses the line and says that we are going to take the legislative process and we are going to regulate how prices

are set in one particular industry.

Dan Whyte, appearing on behalf of Ward Shanahan who lobbies for chevron corporation, stated that they oppose this bill for the reasons given by the other opponents.

Questions From Committee Members:

Senator Williams asked if Beth Baker's office conducted a investigation in the below cost selling.

Beth Baker stated that last year they conducted an investigation into discriminatory pricing in different locations of the state. Because of the vagaries of that law and the lack of resources, they never did pursue that investigation further. They have not conducted an investigation in low cost sales.

Senator Thayer asked isn't it true within the past few years the retailer have gone to the convenience stores to track people in when they sell their gas and they can also by milk, beer, cigarettes, etc. That has been a trend in the industry. You set the price of gasoline, and it has to have a certain mark up, what is to prevent the reverse of happening. The people can market the other products down to next to nothing to drive the volume of their gasoline sales up.

Steve Visocan replied that you can take the price down on anything. The bill says that you can sell the gasoline as low as your cost. If you're selling gasoline as well as a number of other items and if you can take your gasoline down to cost, and you can take all of your other items well below cost, then that is something that you can obviously do. The consumer protection act currently says that you aren't allowed to sell anything under cost. This bill doesn't change that law. This bill defines to the petroleum industry what cost is.

Senator Lynch asked if Representative Bradley feared that this bill would raise the price of gasoline.

Representative Bradley stated that this over the long run is one of the few assurances we have that it will stay down.

Senator Kennedy asked how they would prove the intent to drive somebody out of business.

Representative Bradley stated that when you start to drop way down there, it is pretty self evident as to what you are doing.

Senator Bruski stated that in business the more business that you do, you normally get a bigger discount on your wholesale price, does that hold true in gasoline too.

Steve Visocan replied that this bill only addresses retail gasoline prices. This bill only addresses wholesale sales to retail outlets.

Closing by Sponsor:

Representative Bradley closed by saying that the fiscal note is irrelevant, because they did add language. The concern expressed from agriculture was incorrect. There is a much greater likelihood with the passage of this that agriculture

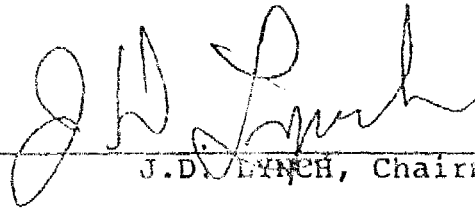
March 22, 1991

Page 6 of 6

prices could go down. The real question is: Is this kind of thing happening? If this is happening, is this the right way of dealing with it? It was studied. The information from the studies shows the problem is there. Something should be done.

ADJOURNMENT

Adjournment At: 12:10 a.m.



J.D. LYNCH, Chairman



DARA ANDERSON, Secretary

JDL/dia

ROLL CALL

BUSINESS AND INDUSTRY COMMITTEE

DATE

3/22/91

52ND LEGISLATIVE SESSION

NAME	PRESENT	ABSENT	EXCUSED
SENATOR BRUSKI	X		
SENATOR FRANKLIN	X		
SENATOR GAGE	X		
SENATOR HAGER	X		
SENATOR NOBLE	X		
SENATOR THAYER	X		
SENATOR WILLIAMS	X		
SENATOR KENNEDY	X		
SENATOR LYNCH	X		

Each day attach to minutes.

3/22/91

BUSINESS & INDUSTRY

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Charles R. Brooks	MT Tire Dealers	538		X
CAROL MOSHER	MT. CATTLE WOMEN	538		X
JOHN D. TAGGART	A.T.O.M	538	X	
BETTIE E. TAGGART	A-TOM STAFF	538	X	
Kay Naenberg	WIFE	538		X
NAN WHITE for WASH. STATE	CHEVRON	538	AMEND	
Tom Kipphut	H. O. 79	261	✓	
Jacky Noble	SD 21	538		X
BETH BAKER	DEPT OF JUSTICE	261 538		
SP Visoian	WPMMA	538	✓	
Janette Gallan	MT Petroleum	538		X
Larry Tasbende	MT. Council of Coops	538	✓	
Bonnie Alexander	mt Petroleum Mkt. Club	538	X	
Bill Dermott	Exxon Company, U.S.A.	538		X
John Augustin	DuPont Crocker Inc	538		X
Steve Browning	Anheuser Busch	261	X with amendment	
JAMES T. MILLER	UT CHAMBER	H.B. 538		✓

(Please leave prepared statement with Secretary)

30-14-209

TRADE AND COMMERCE

360

a regularly established dealer or preventing the competition of any person who in good faith intends or attempts to become such dealer, discriminates between different persons or localities of this state by purchasing any article of commerce at a higher rate or price in one locality than in another, after making due allowance for the difference in the actual cost of transportation from the point of purchase to the point of manufacture, sale, storage, or distribution and for the difference in the grade and quality of such article, is guilty of unfair discrimination, which is prohibited and unlawful.

(2) Proof that any person has paid a higher rate or price for any article of commerce in one locality than in another, after making due allowance for the difference in the actual cost of transportation and for the difference in the grade and quality of such article, shall be prima facie evidence of a violation of this section.

(3) The payment of a higher rate or price in one locality than in another, after making such allowance provided above, is not unfair discrimination provided such higher rate or price is paid for the purpose of meeting the rate or price set by a competitor in such locality. The burden of proof of such fact is upon the person charged with unfair discrimination.

History: En. 51-508 by Sec. 8, Ch. 518, L. 1977; R.C.M. 1947, 51-508.

Cross-References

Montana Small Business Purchasing Act,

Montana product preference provisions, Title 18, ch. 5, part 3.
18-1-112.

30-14-209. Sales at less than cost forbidden. It is unlawful for a vendor to sell, offer for sale, or advertise for sale any article of commerce at less than the cost thereof to the vendor or to give, offer to give, or advertise the intent to give away any article of commerce for the purpose of injuring competitors and destroying competition.

History: En. 51-509 by Sec. 9, Ch. 518, L. 1977; R.C.M. 1947, 51-509.

Cross-References

Unlawful practices, 30-14-103.

30-14-210. Cost survey as evidence of cost. Whenever a particular trade or industry, of which the person complained against is a member, has an established cost survey for the locality in which the offense is committed, such cost survey is competent evidence to be used in proving the costs of the person complained against.

History: En. 51-510 by Sec. 10, Ch. 518, L. 1977; R.C.M. 1947, 51-510.

30-14-211. Establishing cost survey. (1) The department shall, whenever application has been made by 10 or more persons within a particular trade or business, establish the cost survey provided for in 30-14-210. When petition for a cost survey has been so presented to the department, the department shall, as soon as possible, fix a time for a public hearing upon the question of whether the cost survey should be established and, if so, upon the matter of establishing such cost survey. The hearing shall be held at the office of the department and upon that notice which the department may require by rule. However, notice of the hearing shall be published for at least 2 successive weeks in the daily newspaper or newspapers as the department may designate as most commonly circulated in the counties to be affected by the

Flying J Sold Fuel Too Cheap, Says Van Dam

By Cherrill Crosby
Tribune Staff Writer

The Utah Attorney General's Office filed a civil lawsuit Wednesday against Flying J Petroleum Inc., alleging the company violated the Utah Motor Fuel Marketing Act in June by selling gasoline and diesel below cost.

"This is the first in a series of cases, I believe, where we're going to show there is a move afoot by certain retailers to really do harm to the independents and therefore eliminate competition," said Attorney General Paul Van Dam.

The complaint filed in 3rd District Court is the first in a three-pronged investigation into allegations of below-cost selling, price gouging and price fixing, said Art Strong, chief of the office's Fair Business Enforcement Unit.

"We have a couple more cases where the investigation is nearly complete. And they could result in additional actions being filed," Mr.

Strong said.

The suit alleges Flying J, which is headquartered in Brigham City, sold gasoline and diesel fuel below cost — the wholesale prices of fuel with a 6 percent markup — on several days in June through an Ogden retail outlet just off Interstate Highway 15.

The sales injured the Delaware corporation's competitors by forcing them to choose between losing money by also selling below cost, or continuing to sell at or above cost and losing revenues from reduced sales, Mr. Strong said.

Flying J operates an oil refinery in North Salt Lake and retail fuel outlets in Utah and neighboring states.

The complaint seeks a permanent injunction against further below-cost sales and a fine of not more than \$5,000 for each retail sale of fuel below cost.

State prosecutors contend Flying J's sales would eventually force competitors to abandon the retail gasoline and diesel fuel business, especially small competitors who cannot use profits from sales in other markets to offset losses incurred from meeting Flying J's below-cost prices.

"I don't want people to think that our office objects to gasoline dealers giving motorists a better price on gasoline," Mr. Van Dam said. But, if

fuel is sold below cost, "it is going to be very clearly disadvantageous" to small independents whose profit margin is determined by the volume they sell.

"In order to preserve competition, everybody's got to at least play on that level playing field where, there is a [minimum] 6 percent markup," he said.

The suit contends Flying J's below-cost pricing would force small fuel retailers, not affiliated with any company operating an oil refinery, out of the retail fuel industry before larger retailers or ones affiliated with a refinery are forced from the marketplace.

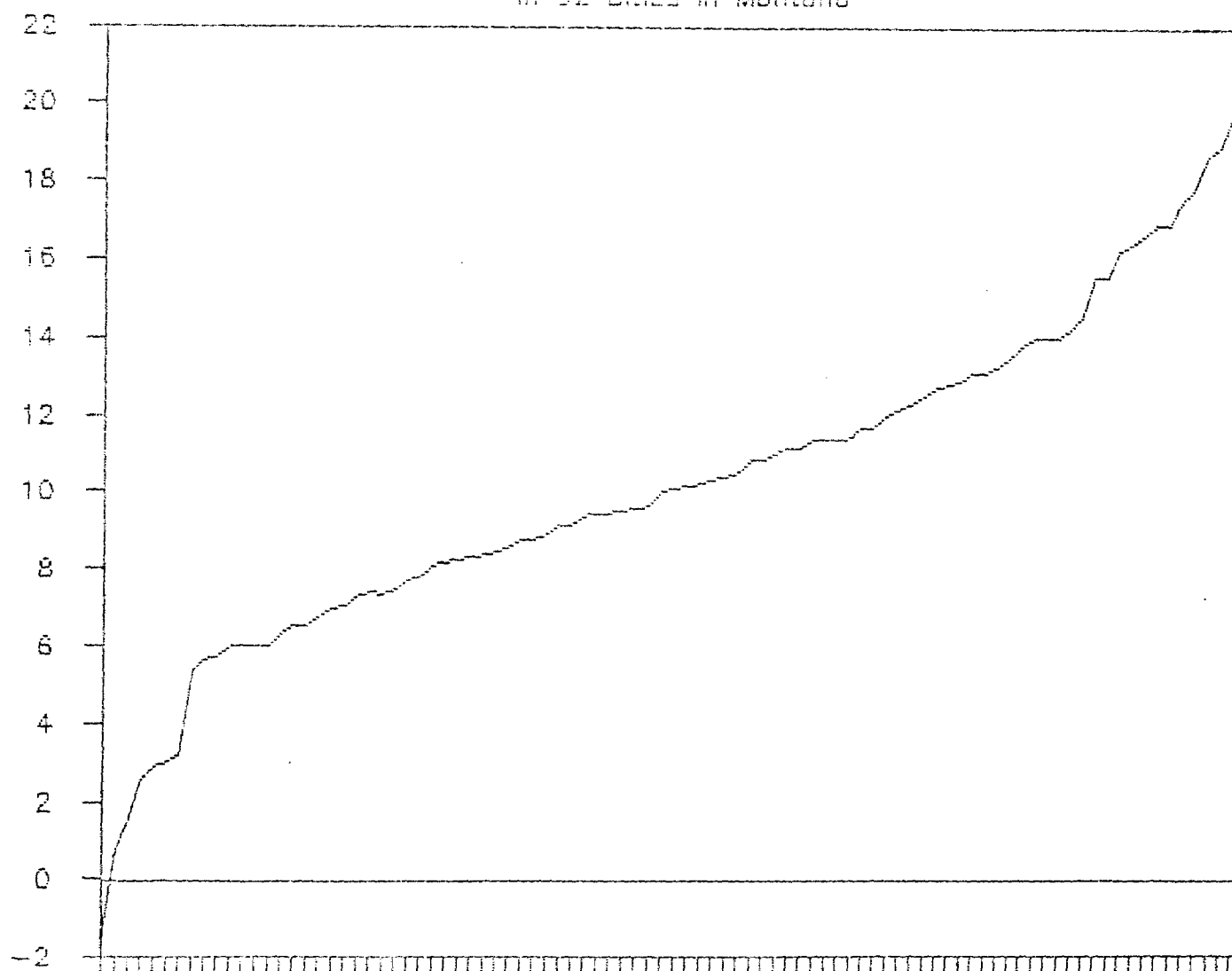
Government Settles With Families
Of

D: L. G. W.:

Margin on Unleaded Gasoline

in 92 Cities in Montana

Margin in cents per gallon

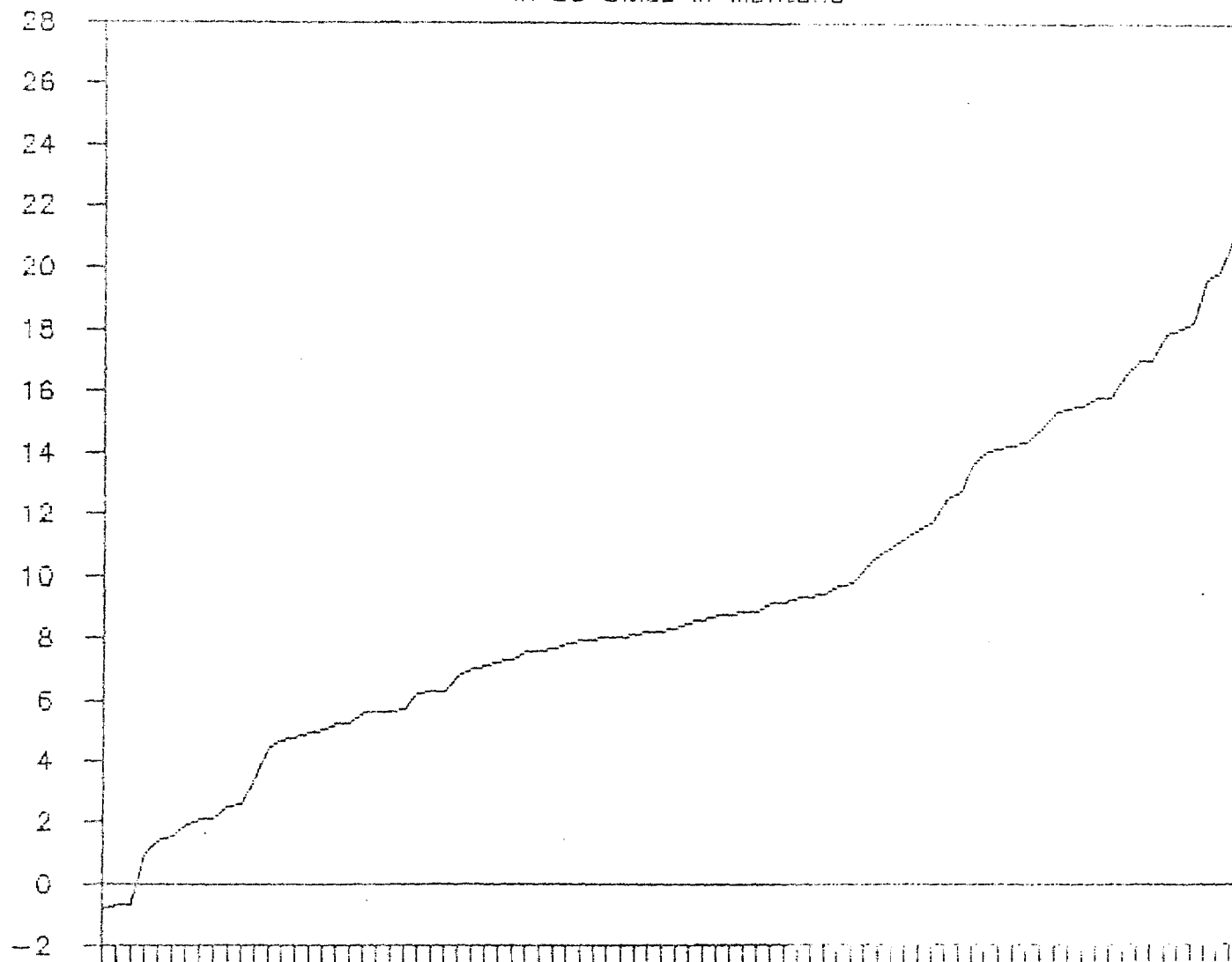


Cities Represented Individually

Margin on Diesel Fuel

in 85 Cities in Montana

Margin in cents per gallon

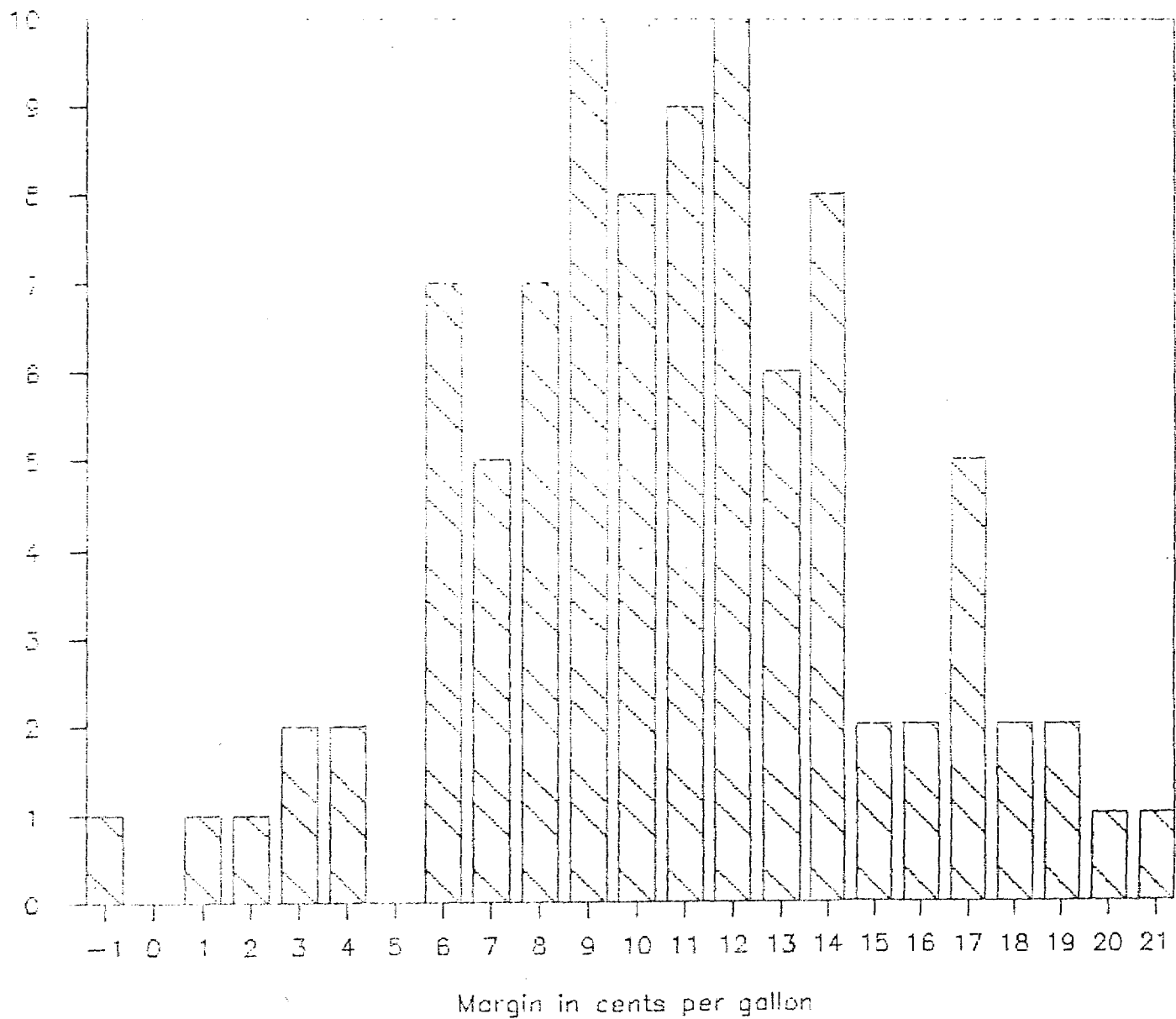


Cities Represented Individually

Margin on Unleaded Gasoline

In 92 Cities in Montana

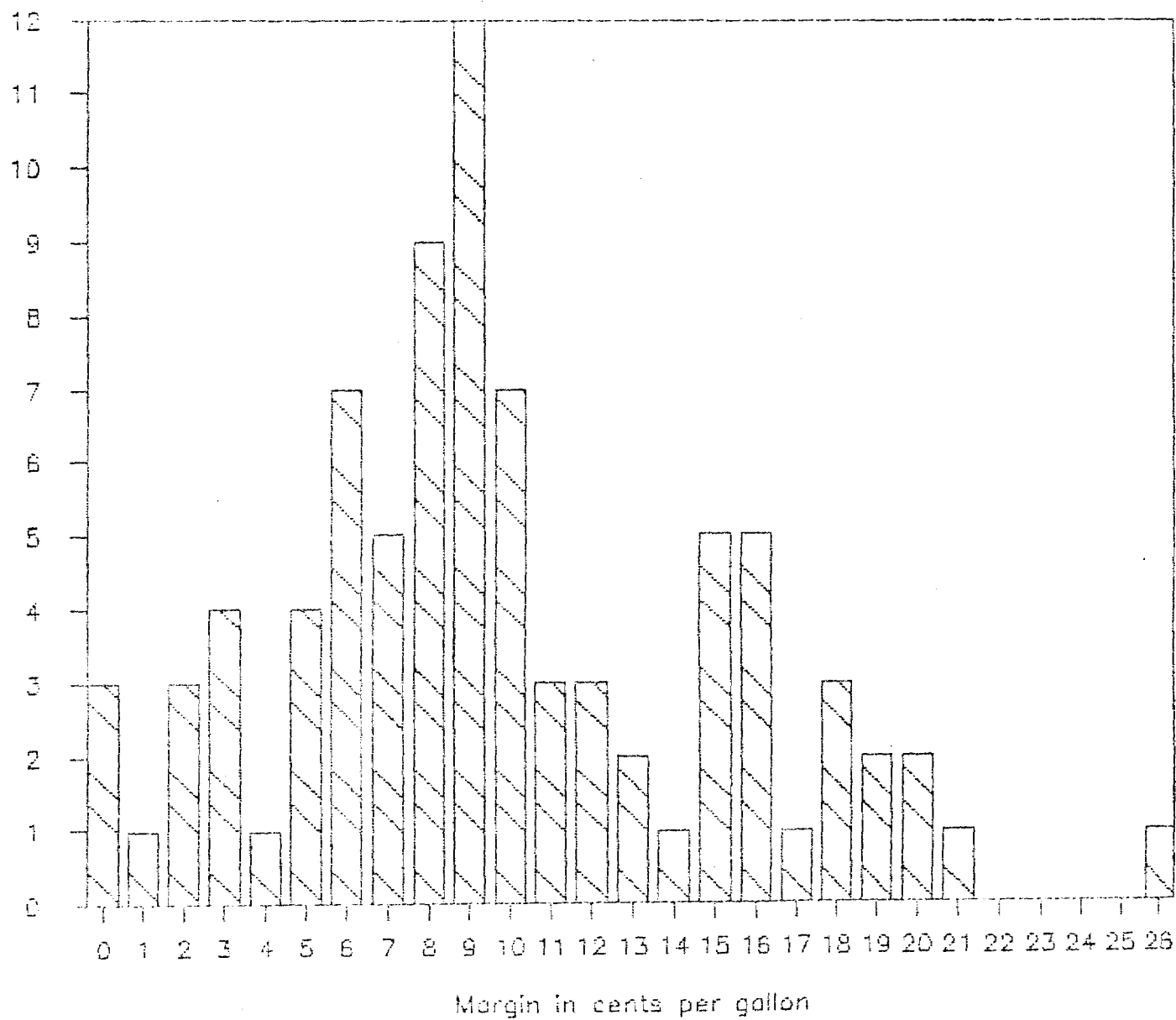
Number Of Cities With Respective Margin



Margin on Diesel Fuel

In 85 Cities in Montana

Number Of Cities With Respective Margin



MOTOR FUELS DEALERS' BREAK-EVEN MARGIN REQUIREMENTS

Source: Responses to mail survey, May 1990, of selected representative dealers throughout Montana

Full Service Stations:

<u>\$</u> <u>Margin</u> <u>Needed</u>	<u>No. of</u> <u>Stations</u>
.073	1
.080	1
.100	6
.120	2
.146	1
.148	3
.150	3
.160	1
.200	2
.260	2
.300	5

.173 Average

Convenience Stores:

<u>\$</u> <u>Margin</u> <u>Needed</u>	<u>No. of</u> <u>Stations</u>
.050	1
.053	1
.055	1
.059	1
.060	3
.068	3
.070	1
.076	4
.080	2
.083	4
.084	1
.085	4
.100	34
.120	3
.128	2
.150	2

.090 Average

HOUSE BILL 538
AS REQUESTED BY THE JOINT INTERIM COMMITTEE STUDY ~~SENATE~~ BUSINESS & INDUSTRY
THE SYSTEM OF MARKETING MOTOR FUEL IN MONTANA

EXHIBIT NO. 3

QUESTIONS AND ANSWERS

DATE 3/22/91

BILL NO. HB538

WHAT IS THE ISSUE BEING ADDRESSED? Motor fuel is sold at less than cost in Montana. Obviously this doesn't happen all the time or in every town. However, pricing motor fuel under cost with the intention of driving competition out of the market is a practice that has been employed in various markets throughout the state.

WHO DOES THIS AFFECT? First of all it affects small businessmen who can only sell below cost for a period of time before they go broke. The company selling fuel below cost will make money in other towns or on other businesses to offset their profit loss on fuel so they can stay in business. Second it affects consumers because competition is eliminated when the small businessman is out of business and the consumer has less choices for where they buy their fuel.

IS THIS PROBLEM UNIQUE TO MONTANA? No, it has been a problem in other states and they have passed legislation to protect the small businessman and the consumer. Twenty three states including Montana have general fair trade laws on the books prohibiting this kind of marketing. Additionally, eleven states have addressed petroleum products specifically. Several others are proposing legislation at this time.

WHY DOES MONTANA NEED ADDITIONAL LEGISLATION? The Unfair Trade Practices and Consumer Protection Act makes it illegal to sell products below cost. However, this act does not provide adequate definition of cost as it relates to motor fuels. Therefore enforcement is difficult at best. The Attorney General has indicated that with the current law his staff does not have adequate resources to research and litigate a complaint. He has indicated that better definition would certainly be helpful and would reduce the overall cost of litigating these situations.

HOW WILL HB 538 WORK? HB 538 makes it illegal for anyone to sell motor fuel at less than cost if the effect is to injure or destroy competition or substantially lessen competition. Cost is defined as the cost of the fuel at the terminal or refinery plus freight to the retail outlet plus the cost of operating the businesses selling the fuel. Operating cost is defined as the actual cost of operating the business, or in the absence of proof of a lesser cost it is determined to be 1% for wholesalers and 6% for retailers.

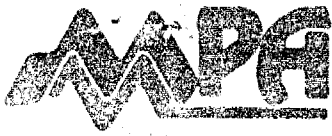
HOW WILL THIS EFFECT MOTOR FUEL PRICES IN MONTANA? If you believe that persons are currently upholding the law and not selling motor fuel for less than cost, then this bill will obviously have no effect. However, if you believe existing law is sometimes broken and that motor fuel will not be sold below cost if this bill is passed, you can expect to see prices come up in those illegal markets and down in markets where unfair competitors have been gouging customers to offset losses in below cost markets. Overall we do not expect the average price for Montana to change in the short term. If this bill is not passed we expect prices to go up over the long term as small businesses are run out of business and the few remaining marketers raise their prices in a noncompetitive marketplace.

PROPOSED AMENDMENTS TO HB 538
Prepared by Beth Baker
Department of Justice

Page 8, line 5: Strike lines 5 through 25.

Page 9, line 1: Strike lines 1 through 8, and lines 19 through 24.
Insert:

NEW SECTION. Section 5. Codification instruction. [Sections 1 through 4] are intended to be codified as an integral part of Title 30, chapter 14, part 2, and the provisions of Title 30, chapter 14, part 2, apply to [sections 1 through 4].



MONTANA PETROLEUM ASSOCIATION

A Division of the
Rocky Mountain Oil and Gas Association

Helena Office
2030 11th Avenue, Suite 23
Helena, Montana 59601
Phone (406) 442-7582
Fax (406) 443-7291

Janelle K. Fallan
Executive Director

SENATE BUSINESS & INDUSTRY

EXHIBIT NO. 5

DATE 3/22/91

BILL NO. HB 538

Billings Office
The Grand Building, Suite 510
P.O. Box 1398
Billings, Montana 59103
Phone (406) 252-3871
Fax (406) 252-3871

Testimony by
Janelle Fallan
Montana Petroleum Association

In opposition to HB 538
Senate Business and Industry Committee
March 22, 1991

This bill is an attempt to regulate the price of gasoline. It is simply unnecessary and it establishes a dangerous precedent in public policy in Montana.

This bill will say to Montanans that we are going to establish a floor on prices of motor fuel and thus guarantee a profit for a small group of people at the expense of Montana consumers who depend upon motor fuel for their livelihood.

An interim subcommittee looked into the issue of predatory pricing and found no evidence. The Attorney General investigated charges of discriminatory pricing during 1990 and found no evidence.

Motor fuel marketing is a highly competitive business. It is that competition that best serves the consumer, assuring that supplies are available and at a competitive price.

This legislation would penalize the efficient operator, who may not need the government to set prices to be profitable. The efficient business operators under this bill will have to prove his innocence from accusations of predatory pricing to be able to charge the consumer less at the pump.

The bill in its present form is vague and needs amendment if you are to approve it.

QUESTIONS

+The purpose clause references "independent and small dealers," but there is no definition of just who these people are.

+There is also no definition of "subsidized pricing" referenced on

line 1, p. 2.

Along those same lines, isn't guaranteeing a profit for undefined independent and small dealers subsidized pricing for them at the expense of the customer or consumer?

+The purpose section also states that subsidized pricing reduces competition in the motor fuel marketing industry. However, if a floor is established -- a minimum profit guaranteed -- wouldn't this bring in more competition to the so-called independent and small dealers and thus drive many of them out of business?

+Next, consider the sentence in lines 8 and 9 (p. 2) which says: "The purpose of (Sections 1-7) is to prevent and eliminate predatory pricing of retail motor fuel."

This sentence appears to assume that predatory pricing exists and this bill will both prevent it and eliminate.

As to the bill itself -- how was the formula derived to obtain the so-called "cost of doing business" (lines 17-19, p. 2.)? Are 1% and 6% standard numbers or were they arbitrarily placed in the bill? The subcommittee also considered margins of 1% on wholesale and 8% on retail, and 3% on wholesale and 6% on retail.

The words "in the absence of proof of lesser cost" -- what does this mean? Who proves it? How is this mechanism triggered?

+P. 5. New section 4 of the bill:

Lines 22-25 are part of the formula prohibiting below-cost sales. However, the words "if the effect is to injure or destroy competition or substantially lessen competition" raise a number of questions. The language is inconsistent, awkward and vague. The same holds true for subsections 2 and 3.

Since the decontrol of oil prices at the federal level in 1981, there have been significant changes in the way gasoline is marketed. Consumers have increasingly sought the most competitive prices available, which are usually found at high volume, self serve outlets. This has forced those who sell motor fuel to change the way they do business or risk loss of market share.

While most gasoline marketers have adapted to the new operating environment, some have responded by asking for government intervention and protection from their competitors. They ask for and support legislation of this kind as a means of forcing prices upward in order to subsidize inefficient operating practices.

As I noted earlier, the interim subcommittee found no evidence of predatory pricing. If there should be problems of this kind in the future, protection is already provided by federal anti-trust

laws, the Federal Trade Commission and the Federal Petroleum Marketing Practices Act.

If there is so-called predatory pricing, who is doing it? Most of the marketing in Montana is by independent wholesalers and retailers -- not by major oil companies. This bill guarantees those wholesalers and retailers a profit margin. It protects these wholesalers and retailers from their own competition.

This bill:

- + fails to consider differences in overhead and operating expenses between different types of retail outlets.
- + is anti-competitive and anti-consumer.
- + is an arbitrary and discriminatory device to fix prices.
- + restricts the right of a seller to price competitively.
- + protects the high-cost operator.
- + will force Montanans to pay higher prices to subsidize inefficient operators.

In conclusion, there is good evidence that passage of this bill will lead to higher motor fuel prices for Montanans. Even though fuel prices seem to have been coming down in recent weeks, I respectfully submit that your constituents may not support higher gasoline prices.

Should state legislatures and other governmental bodies become involved in setting the prices their constituents pay for gasoline? That's what some special interest groups want. They believe legislation should be enacted to prohibit selling gasoline "below cost" and require minimum markups for wholesale and retail businesses.

The forces involved in this proposed legislation—and how such laws might affect the cost of gasoline—are discussed inside.

SENATE BUSINESS & INDUSTRIES
EXHIBIT NO. 5A
DATE 3/22/91
BILL NO. H8538

ISSUE:
**BELOW-COST GASOLINE SELLING
AND MINIMUM MARKUP**



MONTANA PETROLEUM ASSOCIATION

*A Division of the
Rocky Mountain Oil and Gas Association*

2030 11th Avenue, Suite 23
Helena, Montana 59601
(406) 442-7582

Q What is typically proposed in legislation to prohibit below-cost gasoline selling and require minimum markups?

A Generally such legislation would prohibit sales below "cost." Cost would be artificially defined and include an arbitrary cost of doing business. Legislation typically would permit below-cost selling to meet competition.

Q Who supports this legislation?

A This type of legislation is usually proposed by organizations of wholesale gasoline marketers, called "jobbers" or "distributors," and, occasionally, by groups of independent service station operators called "dealers."

Q How do they justify the need for such legislation?

A These groups claim they need these laws to prevent predatory pricing by, in some cases, larger marketers. Proponents claim convenience stores subsidize their gasoline sales with groceries. It's also alleged that refiners and some jobbers subsidize gasoline sales with upstream or wholesale profits. In other cases, the very efficient private brander is the target.

Some jobbers and dealers claim such legislation would keep large refiners and

suppliers from maintaining "monopolistic control" of the gasoline marketplace.

Q Is that a real danger?

A Not according to the Department of Justice. It ranks petroleum refining and retailing as "unconcentrated" industries. Petroleum refining, distribution, and retailing are all very competitive businesses.

Q Who opposes below-cost selling and minimum markup legislation?

A Petroleum refiners and their trade associations oppose such legislation. State departments of commerce and consumer protection offices have also opposed such laws. The Federal Trade Commission has spoken against such laws. And, the U.S. Department of Energy has said that such laws are designed to protect high-cost firms from competition, with the result being higher prices to consumers.

Q Why do refiners oppose this legislation?

A Three reasons. First, it has been shown to raise gasoline prices to consumers. Second, refiners believe legislation is discriminatory because it usually applies only to the petroleum industry. Third, refiners believe that laws such as the Petroleum Marketing Practices Act, the

Sherman Act, the Clayton Act, the Robinson-Patman Act, the Federal Trade Commission Acts, and various state laws already provide adequate protection for petroleum marketers and consumers.

Q Are there any states with petroleum-specific below-cost selling and minimum-markup laws on the books?

A Yes. In recent years Alabama, Florida, Georgia, New Jersey, North Carolina, and Tennessee have enacted such legislation. The Georgia Supreme Court invalidated that state's law.

Q What have been the results of this legislation in these states?

A The American Petroleum Institute examined the effects of such legislation in Alabama, Georgia, and Florida (before the law was invalidated in Georgia). Gasoline prices in these states were compared to prices in neighboring states, both before and after the law was implemented.

The result was an increase in the price of gasoline to consumers, varying from 1.39 cents to 5.75 cents per gallon, depending on the state and who sold the gasoline, a refiner or a reseller. Refiners generally held their price increases below those of resellers.

 How much did this legislation cost the states in the form of higher gasoline prices?

 In Alabama, the API estimated that below-cost selling legislation cost consumers approximately \$37 million during the 12 months following implementation. The costs to Georgia and Florida consumers were about \$43 million and \$57 million, respectively.

 Does this legislation really protect oil jobbers and dealers?

 Not according to a Department of Energy study of deregulated gasoline marketing. It concluded that higher prices resulting from below-cost selling laws would not benefit dealers and jobbers in the long run. The reason is that higher-than-competitive prices would attract more competition, reducing the volume sold by existing marketers. Any increase in profits would quickly vanish due to lower volumes.

 Doesn't below-cost selling legislation protect (or attempt to protect) the most inefficient marketers?

 That's what refiners and many petroleum marketers believe. In a competitive marketplace, there are always winners and losers. Those who operate efficiently earn a reasonable profit; those who operate inefficiently will likely falter unless they make their operations more efficient.

Statement of
W. D. Dermott
Consumer and Regulatory Affairs Manager
for
Exxon Company, U.S.A.
to the
Business and Economic Development Committee
of the
Montana Senate
on
House Bill 538
March 22, 1991

Mr. Chairman, members of the Committee, my name is Bill Dermott and I am Exxon's Consumer and Regulatory Affairs Manager. I'm here today to express my company's opposition to House Bill 538, which would place a floor under prices paid by Montana motorists. Exxon is opposed to this bill because it represents an attempt to guarantee the profits of a small group of marketers at the expense of higher motor fuel prices for the motoring public and the rest of the business community.

The bill is unnecessary to protect the legitimate interests of Montana dealers and distributors.

Attempt to Guarantee Profits

The major premise behind this bill appears to be the assumption that there is something wrong with the way motor gasoline is priced in Montana. Exxon believes that the Montana motor fuel market is highly competitive and that this competition benefits the consumer. In a competitive marketplace, there will be winners as well as losers, those who operate efficiently earning a reasonable profit and those who operate inefficiently, eventually falling by the wayside. This is the basic nature of competition and its results have, over time, provided our citizens with the highest quality products and services at the lowest possible cost.

This bill intrudes upon the efficient working of the marketplace by placing a floor under the prices that retailers, wholesalers, and integrated refiners may charge their customers. In essence, retailers would be required to mark up the motor fuel they sell by at least 6% and wholesalers by at least 1%. Wholesalers and retailers would be required to abandon the market-based pricing which has benefitted consumers, and replace it with cost-based pricing, which discourages efficiency. While no marketer can sell below cost over the long run and remain in business, in the short run all marketers must set their prices at marketplace levels and find a way to control their cost in order to make a profit.

Clearly, the bill's intent is to replace the give-and-take of competition and the efficiency motivation of today's motor fuel marketplace, with a system that requires marketers to recover today's costs with today's prices and gives little incentive for improved efficiency. The only beneficiaries of such a change will be inefficient marketers, while the price of their inefficiency will be paid by Montana motorists.

Raise Motor Fuel Prices

The likely outcome of enactment of this bill will be higher motor fuel prices for consumers and small businesses. A 1985 study by the U.S. Department of Energy concluded that such laws cost the consumer over \$600 million in 1982 alone.

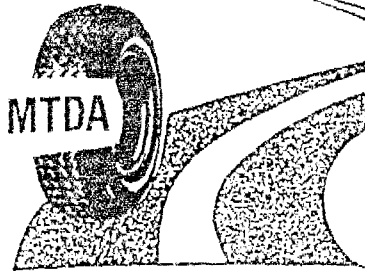
A more recent study of the impacts of state below cost selling laws in Alabama, Georgia, and Florida was completed by the American Petroleum Institute in December 1987. Briefly, in a before and after comparison of retail gasoline prices in these states with neighboring states without below cost selling prohibitions, the study concluded that such laws raised the retail price of gasoline sold by refiners between 1.4¢ and 2.1¢ per gallon. Prices charged by distributors rose between 1.9¢ and 5.7¢ per gallon in the twelve months following enactment of each state's below cost selling prohibition. Should similar increases occur in Montana, this bill could cost the state's motorist as much as \$24 million dollars annually.

Won't Provide Any Benefits

In our view, this legislation will not provide any additional long term benefits to those who support it. According to a DOE study of deregulated gasoline marketing, the higher prices resulting from below cost selling laws would not benefit the existing dealers and distributors in the long run because higher than competitive prices would attract more competition which would reduce the volume sold by existing marketers. While higher consumer prices and higher unit margins for dealers and distributors would likely remain, any increase in profits for marketers would quickly vanish due to lower volumes.

UNNECESSARY

This bill is clearly unnecessary to protect the legitimate business interests of independent motor fuel marketers. These merchants are already protected against unfair pricing or other unfair marketing practices of their suppliers by a large body of law including the Montana Unfair Trade Practices Act, the Sherman Act, Clayton Act, Robinson-Patman Act, and the Federal Trade Commission Act which prohibit actions to control prices and supply.



Service is our only product!

SENATE BUSINESS & INDUSTRY

EXHIBIT NO. 7

DATE 3/22/91

FILE NO. 46538

MONTANA TIRE DEALERS ASSOCIATION

318 N. Last Chance Gulch

P.O. Box 440

Helena, Montana 59624

(406) 442-3388

1-800-527-8065

TESTIMONY
MARCH 22, 1991

ROOM 410

HB 538

SENATE BUSINESS AND INDUSTRY
COMMITTEE

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE;

FOR THE RECORD, I AM CHARLES BROOKS EXECUTIVE VICE PRESIDENT OF THE MONTANA TIRE DEALERS ASSOCIATION. I AM HERE TODAY IN OPPOSITION TO HB 538.

THIS PROPOSED LEGISLATION LAYS THE AX AT THE VERY ROOT OF THE FREE ENTERPRISE SYSTEM AND THE FREE MARKET PLACE. BY LEGISLATION, WE ARE MANDATING CERTAIN PROFIT LEVELS AND MOVING FROM A FREE MARKET PLACE SYSTEM, TO A GOVERNMENT CONTROLLED MARKET PLACE IN THE SELLING OF MOTOR FUELS. THIS TYPE OF CONTROL HAS NOT WORKED IN THE PAST AND I SUGGEST TO YOU THAT IT WILL NOT WORK NOW ARE IN THE FUTURE.

THIS LEGISLATION HAS BEEN SET FORTH AS A PRO BUSINESS BILL TO PROTECT THE SMALL DEALER OF MOTOR FUELS. I SUGGEST TO YOU THIS IS A ANTI-CONSUMER BILL. LATTER I WILL SET FORTH REASONS FOR THIS OBSERVATION. HOWEVER, LET ME FIRST SHARE WITH YOU MY EXPERIENCE AS A RETAIL MERCHANT OPERATING WITH PRICE CONTROLS. IN THE 1970'S RETAILERS COULD NOT SELL MERCHANDISE BELOW 5% ABOVE COST. WE WERE JUST GETTING OUR BUSINESS STARTED AND NEEDED TO BUILD VOLUME IN A HURRY SO WE BEGAN TO MAKE VARIOUS DEALS WITH MANUFACTURERS TO ADVERTISE VERY GOOD PRICES ON HIGHLY CONSUMABLE ITEMS. IN SHORT ORDER WE HEARD FROM THE DEPARTMENT OF COMMERCE, THAT A COMPLAINT HAD BEEN FILED AGAINST OUR PRICING PRACTICES. WE WERE SELLING BELOW THE 5% LAW. THEY ASK FOR RECORDS TO SUPPORT THE PRICE AND OUR ACCOUNTANT WOULD PROVIDE THE NECESSARY RECORDS AND SEND THEM TO HELENA. THEN A LETTER WOULD BE RECEIVED FROM THE DEPARTMENT CLEARING US OF ANY VIOLATIONS. THIS WENT ON FOR A NUMBER OF MONTHS AND ONE DAY I CALLED THE DEPARTMENT AND ASKED WHAT WOULD HAPPEN IF WE SOLD BELOW THE 5% LAW AND THE RESPONSE WAS, A LETTER ASKING US NOT TO DO IT AGAIN. SOMETIME IN THE 1970'S THIS LAW WAS REMOVED FROM THE BOOKS. I RECOGNIZE THAT THIS PROPOSED LEGISLATION HAS A ENFORCEMENT PROCEDURE THAT WAS NOT IN THE LAW OF THE 1970'S.

LET ME SHARE WITH YOU SOME FACTS ABOUT THIS LEGISLATION AS I SEE THEM.

1. THIS IS A ANTI-CONSUMER BILL. WHY DO I SAY THIS ? LET ME SHARE WITH YOU TWO PHONE CALLS I RECEIVED ON THIS BILL. THE FIRST ONE WAS FROM A MEMBER WHO OPERATES A NUMBER OF C-STORES THAT SELL MOTOR FUELS. WE ARE OPPOSED TO PRICE CONTROLS, HOWEVER WE WILL

SIT ON THE SIDELINES ON HB 538. THE REASON GIVEN, OUR PROFITS WILL GO UP, IF HB 538 BECOMES LAW.

2. I RECEIVED A CALL FROM A WHOLESALE DISTRIBUTOR AND HE REQUESTED WE NOT OPPOSE THE BILL. THE REASON, THIS PROPOSED LEGISLATION WILL GIVE US ADDITIONAL PROFITS.

3. THIS LEGISLATION WILL GIVE THE TOWN PUMPS, THE SUPER AMERICAS, THE C-STORE CHAINS ADDITIONAL PROFITS, WHICH WILL ALLOW THEM TO CONTINUE TO EXPAND AND DOMINATE VARIOUS MARKETS. THE PROPONENTS OF THIS BILL SUGGEST TO YOU, THAT THEY WANT A LEVEL PLAYING FIELD. MY EXPERIENCE IN RETAILING, TAUGHT ME, YOU MAKE A LEVEL PLAYING FIELD BY LEARNING TO COMPETE IN THE MARKET PLACE AND CHANGE WITH THE CHANGING DEMANDS OF THE CONSUMER.

4. IT WOULD BE WISE TO REVIEW THE MILK CONTROL PROBLEM BEFORE YOU BRING ANOTHER COMMODITY, UNDER GOVERNMENT CONTROL. ACCORDING TO BUDGET FIGURES, IT COST THE STATE OF MONTANA \$290,000.00 DOLLARS TO PRICE CONTROL MILK. I WOULD SUGGEST TO YOU WITH OVER 1300 SERVICE STATION IN THIS STATE THE COST TO HANDLE MOTOR FUEL PRICE CONTROLS COULD EXCEED THESE FIGURES, VERY QUICKLY.

5. MANY OTHER MERCHANTS ARE COMPETING IN FIELDS WHERE PROFIT MARGINS ARE VERY THIN, SHALL WE ALSO ASSURE THEM A SET PROFIT MARGIN?? I WOULD SUGGEST TO THOSE WHO SUPPORT THIS LEGISLATION THAT THEY WOULD BE BETTER SERVED AND MORE PROFITABLE, IF THEY SPENT MORE TIME LEARNING TO COMPETE IN THE MARKET PLACE RATHER THAN LOOKING TO GOVERNMENT TO ASSURE THEM A PROFIT. I HAVE A BOOK WHICH I WOULD LIKE FOR REP. BRADLEY TO PRESENT TO THE SUPPORTS OF THIS BILL ENTITLED "STANDING TOE TO TOE TO COMPETITION." BY LEGISLATION OR REGULATIONS WE ARE ATTEMPTING TO REMOVE THE RISK OF DOING BUSINESS AND ASKING SOMEONE ELSE TO PAY THE BILL, AND IN THIS CASE THE CONSUMER WILL PICKUP THE TAB.

6. IN CLOSING MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE I HAVE ATTACHED TO MY TESTIMONY COPY OF A LETTER FROM THE FEDERAL TRADE COMMISSION ADDRESS TO SENIOR ASSISTANT ATTORNEY GENERAL OF THE STATE OF WYOMING, WHICH DEALS WITH THIS VERY PROBLEM OF PREDATORY PRICING. I WOULD ASK YOU TO REFER TO PAGE TWO OF THIS LETTER PARAGRAPH 2. JUST ONE STATEMENT I WANT TO SHARE WITH YOU. "WE BELIEVE HOWEVER THAT PREDATORY PRICING IS DIFFICULT TO ACCOMPLISH AND IS THEREFORE QUITE RARE." THE LETTER HAS OTHER INTERESTING OBSERVATION ABOUT PREDATORY PRICING, WHICH I HOPE YOU WILL TAKE TIME TO READ. .

THE FREE COMPETITIVE ENTERPRISE SYSTEM BUILT THIS GREAT STATE AND OUR NATION. A FREE MARKET PLACE HISTORICALLY HAS BENEFITED BOTH THE MERCHANT AS WELL AS THE CONSUMER. THE FREE MARKET PLACE CONTINUES TO BE THE BEST PLACE TO SET PRICE OF GOODS AND SERVICES.

I URGE YOU TO GIVE HB538 A DO NOT PASS RECOMMENDATION.

THANK YOU FOR THE OPPORTUNITY TO PRESENT THIS TESTIMONY.



BUREAU OF COMPETITION

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Gay Woodhouse, Esq.
Senior Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002

Dear Ms. Woodhouse:

I am writing in response to your letter of September 17, in which you described your interest in updating the Wyoming statute that governs below-cost sales. The staff of the Federal Trade Commission appreciates this opportunity to give you some information about our own statutes and also to comment more generally about this subject.¹

We believe that every state should be circumspect in enacting prohibitions against below-cost pricing. Statutory prohibitions against pricing below cost can chill price competition that would be beneficial to consumers; due to the difficulty of distinguishing between below-cost pricing and vigorous competition. Moreover, after having reviewed many allegations of such conduct, we believe that firms will rarely engage in genuine below-cost pricing, because they typically know that they cannot count on a later period of monopoly power during which they can raise prices above their costs and recoup their earlier losses.

The remainder of this letter is divided into two sections. In the first I set out some general thoughts about the difficulties of applying predatory pricing laws without harming consumers in the process, and propose an interpretive rule that you may want to consider in administering any statute in this area. In the second section I address the specific questions that you asked about our experiences with our own predatory pricing statutes.

¹ This letter sets out the views of the FTC's Bureaus of Competition, Consumer Protection, and Economics, and not necessarily those of the Commission itself or of any individual Commissioner. The Commission, however, with Commissioners Bailey and Strenio dissenting, has voted to authorize us to submit these comments to you.

Gay Woodhouse, Esq.

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I. General comments on below-cost pricing

The theory of below-cost or predatory pricing is that a firm could price its products below the actual costs of producing them, for a prolonged period of time, and could eventually drive its less well financed rivals from the market. The original firm would then be in a monopoly position and would seem to be able to raise prices, perhaps high enough to make up all the initial losses and still show an overall profit on the venture.

We believe, however, that predatory pricing is difficult to accomplish and is therefore quite rare. At least two obstacles stand in its path. First, the predator must absorb relatively large losses, since, as it acquires an ever-larger market share, it must bear per-unit losses on an ever-larger number of units. This means that the predator's financial losses will be much larger than those of its putative victims. Second, the predator cannot count on having a period of monopoly power within which to recoup these losses. When the predator begins to raise prices, the market will become attractive and firms will once more enter in response to the new profitability of the industry. This competitive response may be lessened if the predator can raise prices in a piecemeal or hidden way, or if the market is protected by barriers to the entry of new firms. In the absence of significant problems of this sort, however, we can expect that entry will in fact occur rather rapidly, and that it will ensure that prices do not remain above competitive levels.

These views are consistent with the Supreme Court's recent opinions in two cases involving predatory pricing, Matsushita Electric v. Zenith Radio Corp., 106 S. Ct. 1348 (1986), and Cargill v. Monfort, 107 S. Ct. 484 (1986). These decisions contain the Court's first discussion of the issue since 1967² and reflect the substantial developments in the legal and economic analysis of predatory pricing that have occurred in the past two decades. The Matsushita case involved allegations that Japanese television manufacturers had engaged in a complicated conspiracy to raise prices in their home market and use the profits to subsidize predatory pricing here. A for summary judgment raised the question of whether there any genuine issues of fact for trial. Concluding that predation was unlikely on the facts alleged, the Supreme Court observed that "there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more

² See Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).

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rarely successful." 106 S. Ct. at 1357-58. The Cargill case raised similar issues. There a meat-packing company had challenged a merger between two of its competitors, alleging that this would give the merged firm the financial resources to engage in predatory pricing. Although relying on technical grounds to reverse a ruling for the plaintiff, the Court indicated more generally that the mere possibility of such harm, without any more specific evidence, was too speculative to support an injunction against the merger. The Court said that "[c]laims of threatened injury from predatory pricing must, of course, be evaluated with care," and that "the obstacles to the successful execution of a strategy of predatory pricing are manifold, and . . . the disincentives to engage in such a strategy are accordingly numerous." 107 S. Ct. at 495 n.17.³

Underlying these decisions is a belief that the success of any predatory pricing effort is inherently uncertain:

(T)he short-run loss [from predatory pricing] is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits. The success of any predatory scheme depends on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain.

Matsushita, 106 S. Ct. at 1357-58.

³ In Cargill the Court stated: "Predatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run." 107 S. Ct. at 493 (footnote omitted). Accord, Matsushita, 106 S. Ct. at 1355 n.8. The Court found it unnecessary to consider "whether above-cost pricing coupled with predatory intent is ever sufficient to state a claim of predation." Cargill, 107 S. Ct. at 493 n.12. Commentators and courts continue to differ on the exact measure of cost to be used in defining below cost pricing. Id. To some extent the definition of the cost benchmark will determine the incidence of predation. The divergent technical positions on the cost question, however, do not undermine the consensus that predation, however defined, occurs infrequently.

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Several factors contribute to the uncertainty of outcome. One is the need for entry barriers, as the Matsushita Court discussed. Entry barriers are essential if a predatory scheme is to work, yet, in our open economy, a market generally is not insulated from competition long enough to permit recoupment of the initial losses. Another problem for the rational predator is that future profits must be discounted. By dropping prices below cost the predator forgoes profits in current dollars, whereas any recoupment will necessarily be in discounted future dollars. Still another source of uncertainty is the fact that recoupment may be affected by intervening changes in business, technological, or regulatory conditions. Accordingly, we believe that predatory pricing statutes address a rare problem.

In addition, we believe that such statutes may be affirmatively harmful to consumers. If the statutory definition of the offense is overbroad (making it too easy to prove) or if the offense is so vaguely defined that erroneous public and private applications of the statute are probable, businesses may be deterred from vigorous but legitimate price competition. Deterrence from competition is a particular problem because firms have an incentive to complain about the successful competitive efforts of their rivals, however proper those efforts may be.

These risks can be seen in the mix of complaints that are brought to the Commission. During one recent five-month sample period we received nineteen complaints of predatory pricing. Commission attorneys followed up on all of these by calling the complainants to request additional and more specific information. In fourteen of the nineteen cases the complainants had no data to support their charge; they simply "felt" that their competitors were pricing too low. In most of these cases it appeared more probable to our investigators that the alleged predators were achieving operational efficiencies that would legitimately allow them to charge lower prices. In support of this they observed that most of the industries had low entry barriers, which would tend to rule out a strategy of predatory pricing.

To screen out those cases in which predatory pricing is unlikely, we consider the structural characteristics of the market before reaching questions of costs and prices. This initial inquiry focuses on whether a market is so structured and so sufficiently protected by entry barriers that predation is a realistic possibility. The Commission has followed this

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approach in its own most recent predatory pricing cases.⁴ In dismissing the charges in these cases, the Commission found it unnecessary to reach a detailed examination of evidence relating to either intent or conduct. Rather, the Commission observed in each case that the market structure and the vigor of current competition precluded any dangerous probability that below cost pricing, if it had occurred, could have led to sustained monopoly power.

This phased approach permits careful evaluation of predatory pricing complaints, yet also reduces the resources necessary to assess them, because market information typically is more available and less ambiguous than evidence regarding an individual firm's cost levels or intent to monopolize. In addition, reliance on market evidence limits the risk that a law enforcement investigation might chill legitimate price competition. By using such evidence to weed out improbable predatory pricing claims, competitive firms are not subjected to intrusive and potentially expensive inquiries into their motives, cost structures, and business plans.

II. Specific questions

Our answers to your specific questions are as follows:

1. Do you have a selling below cost statute or "discrimination" statute?

No statute enforced by the Commission prohibits below-cost pricing directly. Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13, prohibits discrimination in price between different purchasers of commodities of like grade and quality under certain conditions. Section 2 of the Sherman Act, 15 U.S.C. § 2, prohibits monopolization and attempts to monopolize. The Commission has

⁴ International Telephone & Telegraph Corporation, 104 F.T.C. 280 (1984) ("ITT"); General Foods Corp., 103 F.T.C. 204 (1984) ("General Foods"). In ITT, the Commission determined that sales "at prices that equal or exceed average variable cost should be strongly, often conclusively, presumed to be legal." 104 F.T.C. at 403. The Commission also concluded that sales "at prices below average variable cost for a significant period of time should be rebuttably presumed to be anticompetitive." Id. at 404. Finally, the Commission determined that sales "at prices that equal or exceed average total cost should be conclusively presumed to be legitimate." Id. In ITT and General Foods, Commissioner Bailey disagreed with the Commission's definition of predation.

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no authority to bring actions under the Sherman Act directly, but Sherman Act standards can be applied to actions brought under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

2. Please send a copy of your law.

Copies of the statutes cited above are attached.

3. If you do not have a sales below cost statute, how does your state deal with problems in this area?

Not applicable.

4. Do you consider your statute effective?

We believe that the statutes cited above provide effective means of challenging predatory pricing.

5. How workable is your statutory definition of "cost?"

"Cost" is not defined in the statutes enforced by the Commission, and the definition of the term remains unresolved. See, e.g., Matsushita, 106 S. Ct. at 1355, nn. 8 & 9.

6. How is your law enforced (attorney general, county attorney, administrative agency, private action)?

Section 5 of the FTC Act is enforced by the Commission. The Sherman Act is enforced by the Department of Justice and by the Federal Trade Commission through Section 5 of the FTC Act. The Robinson-Patman Act is enforced by both the Commission and the Department of Justice. In addition, private actions may be brought under the Sherman Act and the Robinson-Patman Act. State attorneys general may also bring suit as *parens patriae*. 15 U.S.C. § 15c.

7. How effective are the private remedies in your statute?

A plaintiff in a private action who proves injury to his business or property may recover treble damages. 15 U.S.C. § 15.

8. What are the penalties for selling below cost?

The Commission is empowered to issue cease-and-desist orders. A court may award injunctive relief as well as damages.

Gay Woodhouse, Esq.

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9. How many actions has your office filed in the past 5 years for sales below cost?

a) Number of criminal actions?

Not within our jurisdiction.

b) Number of civil actions for injunction?

The Commission filed no such actions in this period. It decided two such cases, ITT and General Foods, cited above in footnote 4.

c) Number of civil actions to revoke a corporate charter?

Not within our jurisdiction.

d) Description and number of other actions?

Our remedies are limited to issuing cease-and-desist orders.

10. Who investigates complaints under your below cost sales act?

The predatory pricing complaints that appear to warrant investigation are studied by the agency's own staff. The primary responsibility for antitrust matters lies with our Bureau of Competition.

11. What type of staff does the agency have to investigate these cases? What is the budget for this agency?

Investigatory teams include both economists and lawyers, with paralegal assistance sometimes available as well. The total budget of the FTC is \$69.7 million, with \$31.4 million of that designated for all antitrust matters. We do not have a separate line item in the budget for predatory pricing matters.

12. How many attorneys in your office are assigned to enforcing below cost sales statutes?

Attorneys are assigned to monitor particular industries rather than to enforce certain statutes. Therefore, there are no attorneys specifically designated for predatory pricing matters.

13. Has the constitutionality of your law been upheld?

Yes. See Atlas Bldg. Products v. Diamond Block & Gravel, 269 F.2d 950 (10th Cir. 1959), cert. denied, 363 U.S. 843

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(1960) (Robinson Patman Act § 2(a)); Sears, Roebuck & Co., 258 F. 307 (7th Cir. 1919) (FTC Act); Standard Oil v. United States, 221 U.S. 1 (1911) (Sherman Act).

14. Are there any rules or regulations promulgated pursuant to this statute?

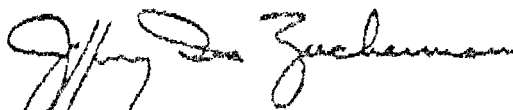
There are none dealing specifically with the issue of below-cost pricing.

Conclusion

The Commission staff believes that predatory pricing statutes, while not intrinsically without merit, can do more harm than good. We therefore recommend that they be drafted and applied with care. In particular, we believe that revisions intended to make the law stricter and enforcement actions easier to bring should be carefully considered. We also recommend that any analysis of a predatory pricing claim begin with a threshold inquiry into market structure.

Thank you again for the opportunity to comment on these issues. We hope you find our observations helpful. Please don't hesitate to get back in touch if we can give you any further information. In particular, we would be happy to comment, at your request, on any specific legislative proposal that you might draft.

Sincerely yours,



Jeffrey I. Zuckerman
Director

EXECUTIVE ACTION ON HOUSE BILL 538Motion:

Senator Noble moved to amend HB 538 by inserting a termination date of July 1, 1993.

Senator Noble moved HB 538 be not concurred in as amended.

Discussion:

Senator Gage stated that there seems to be a considerable amount of confusion among the people who are involved with this bill as to what the bill is really doing. He had a couple of retailers visit with him after the hearing, and it was there option that this bill applies to all products that are sold by a person who happens to sell motor fuel products. The response that he got from Representative Bradley when he asked her about the language that says other cases on page two, line nineteen-is that talking about only the cost in regard to motor fuel products, and she said yes. The two retailer's response was she made an error in her response.

Senator Noble stated that it goes back to basics, we want to subsidize an industry, where are we going to stop?

Senator Thayer stated that another point of confusion is he had a call from a station operator in Great Falls, Montana, and he said that they can't operate on six percent. Senator Thayer told him that the bill limits you to six percent. The station operator replied that he didn't think so.

Senator Lynch stated six percent was the minimum.

Steve Visocan, past president of the western petroleum marketer's association, stated that in drafting this bill they used several other state's legislation. (See Exhibit 6).

Senator Kennedy stated that he looks at the bill as keeping the big guy from driving the little guy out of business by selling below cost, and having the financial backing to do that. This bill is for the protection of the little guy.

Senator Kennedy spoke against the motion by Senator Noble that HB 538 be not concurred in as amended. This is clarifying some law that is on the books already.

Amendments, Discussion, and Votes:

The motion by Senator Noble to amend HB 538 by inserting a termination date of July 1, 1993 passed unanimously.

Recommendation and Vote:

The motion by Senator Noble that HB 538 be not concurred in as amended passed 5 to 4 vote.

Senator Kennedy requested a minority report for HB 538.

EXECUTIVE ACTION ON HOUSE BILL 719

ROLL CALL

BUSINESS AND INDUSTRY COMMITTEE

DATE

3/26/91

52ND LEGISLATIVE SESSION

NAME	PRESENT	ABSENT	EXCUSED
SENATOR BRUSKI	X		
SENATOR FRANKLIN	X		
SENATOR GAGE	X		
SENATOR HAGER	X		
SENATOR NOBLE	X		
SENATOR THAYER	X		
SENATOR WILLIAMS	X		
SENATOR KENNEDY	X		
SENATOR LYNCH	X		

Each day attach to minutes.

SENATE BUSINESS & INDUSTRY

EXHIBIT NO. 6

DATE 3/26/91

BILL NO. 144528

(3) **ILLEGALITY OF LOSS LEADERS.** Any sale of any item of merchandise either by a retailer or wholesaler, at less than cost as defined in this section with the intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor, impairs and prevents fair competition, injures public welfare and is unfair competition and contrary to public policy and the policy of this section. Such sales are prohibited. Evidence of any sale of any item of merchandise by any retailer or wholesaler at less than cost as defined in this section shall be prima facie evidence of intent or effect to induce the purchase of other merchandise, or to unfairly divert trade from a competitor, or to otherwise injure a competitor.

Amendments to House Bill No. 538
Third Reading Copy

For the Committee on Business and Industry

Prepared by Bart Campbell
March 26, 1991

1. Title, line 13.

Following: "DATE"

Insert: "AND A TERMINATION DATE"

2. Page 10, lines 10 and 11.

Following: "date" on line 10

Insert: "-- termination"

Following: "approval" on line 11

Insert: "and terminates July 1, 1993"

ROLL CALL VOTE

SENATE COMMITTEE BUSINESS AND INDUSTRY

Date 3/26/91 Bill No. 143538 Time 10 a.m.

NAME	YES	NO
SENATOR WILLIAMS	X	
SENATOR THAYER	X	
SENATOR NOBLE	X	
SENATOR HAGER	X	
SENATOR GAGE	X	
SENATOR FRANKLIN	X	
SENATOR BRUSKI	X	
SENATOR KENNEDY	X	
SENATOR LYNCH	X	

DARA ANDERSON

J.D. LYNCH

Secretary

Chairman

Motion:

AMENDMENTS

ROLL CALL VOTE

SENATE COMMITTEE BUSINESS AND INDUSTRY

Date 3/26/91 Bill No. HB 538 Time 10 a.m.

NAME	YES	NO
SENATOR WILLIAMS		X
SENATOR THAYER	X	
SENATOR NOBLE	X	
SENATOR HAGER	X	
SENATOR GAGE	X	
SENATOR FRANKLIN		X
SENATOR BRUSKI		X
SENATOR KENNEDY		X
SENATOR LYNCH	X	

DARA ANDERSON

J.D. LYNCH

Secretary

Chairman

Motion: BE NOT CONCURRED IN. AS
AMENDED

MINORITY REPORT

SENATE STANDING COMMITTEE REPORT

Page 1 of 1
March 26, 1991

MR. PRESIDENT:

We, the minority of the committee on Business and Industry having had under consideration House Bill No. 538 (third reading copy -- blue), respectfully report that House Bill No. 538 be amended and as so amended be concurred in:

1. Title, line 13.

Following: "DATE"

Insert: "AND A TERMINATION DATE"

2. Page 10, lines 10 and 11.

Following: "date" on line 10

Insert: "-- termination"

Following: "approval" on line 11

Insert: "and terminates July 1, 1993"

4-11-91 188
Signed: *Bob Williams*
Bob Williams

Signed: *John "Ed" Kennedy, Jr.*
John "Ed" Kennedy, Jr.

Signed: *Eve Franklin*
Eve Franklin

Signed: *Betty Bruski*
Betty Bruski

191 3-26-91
And. Coord.

CR 2-66 2:50
Sec. of Senate

651346SC.S.11

MAJORITY REPORT

SENATE STANDING COMMITTEE REPORT

Page 1 of 1
March 26, 1991

MR. PRESIDENT:

We, the majority of the committee on Business and Industry having had under consideration House Bill No. 538 (third reading copy -- blue), respectfully report that House Bill No. 538 be amended and as so amended not be concurred in:

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Following: "date" on line 10

Insert: "-- termination"

Following: "approval" on line 11

Insert: "and terminates July 1, 1993"

Signed: _____

John "J.D." Lynch, Chairman

Signed: _____

Gene Thayer

Signed: _____

Jerry Noble

Signed: _____

Thomas O. (Tom) Hager

Signed: _____

Belwyn Gage

1B 487, 488
Amd. Coord.

513 E 26 250
Sec. of Senate